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In the

Supreme Court of the United States

October Term, 1955

No. 993

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

vs.

OMER M. HARRIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND PRINTED APPENDIX HERETO

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OMER M. HARRIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

State Farm Mutual Automobile Insurance Company prays that a writ of certiorari issue to review the judgment and unreported opinion of the United States Court of Appeals for the Sixth Circuit, entered February 29, 1956, and its final judgment entered on April 10, 1956 on a petition to re-hear, seasonably filed. The judgment of the United States District Court for the Western District

of Tennessee, rendered in favor of petitioner, was reversed.

On May 17, 1956, an order was entered in the Court of Appeals recalling the mandate and staying it for twenty days for filing this petition for certiorari. It appears in printed Appendix B hereto, P. 44a.

CITATIONS TO OPINIONS BELOW

The findings of fact, opinion and conclusions of law of the District Court of the United States for the Western District of Tennessee appears (R 66a) and for convenience, is printed in Appendix B hereto at page 3a. The first opinion of the United States Court of Appeals is printed in Appendix B at page 14a. The final opinion of the United States Court of Appeals, on a seasonably filed petition to rehear, is printed in Appendix B hereto, page 43a. The petition to rehear is printed in Appendix B hereto at page 29a.

The mandate was recalled and stayed for twenty days on May 17, 1956. Appendix hereto, P. 44a.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 29, 1956, and is in the record. It is printed in Appendix B, Page 13a. A re-hearing was denied on April 10, 1956. Appendix B hereto, page 43a.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals contrary to Rule 52 of the Federal Rules of Civil Procedure should set aside the findings of fact of the District Court when not only not

clearly erroneous, but based on uncontradicted evidence, and in a case where the only witness for the respondent was observed by the Trial Court and his credibility adjudged. He was found guilty of practicing a fraud on petitioner to obtain the insurance policy sued on and then to assist his father in recovering a judgment against him in the State Court.

2. Whether the Circuit Court of Appeal was in error in refusing to follow the opinion of this Court, and that of the Supreme Court of Tennessee, without comment on either of them. The opinion of the Circuit Court of Appeals conflicts with both and, in effect, holds that State Statutes are not a part of an insurance contract.

3. Whether the decision of the Sixth Circuit Court of Appeals, which conflicts with the decision of the Circuit Court of Appeals for the Fourth, Eighth and Tenth Circuits, and also conflicts with its own former opinion, should stand.

4. Whether the misrepresentations, oral and written, of the insured in obtaining the policy, even though made innocently and in good faith, and which the Court of Appeals held, as a matter of law, increased the risk, avoided the policy as held by the Supreme Court of Tennessee and other Courts of Appeals. The Court of Appeals did not follow the decisions.

STATUTES INVOLVED

The Statutes involved are Williams Tennessee Code, Sections 6086, 6126 and 6179 (4), though the last named has no application in this suit.

They are printed in Appendix B hereto, page 44a.

Rule 52 (a) Civil Procedure applicable portion Appendix B hereto, P. 45a.

STATEMENT OF THE CASE

Respondent recovered a jury verdict against his son, Ralph Harris, for $15,000.00 in the State Court of Obion County, Tennessee for personal injuries sustained while riding in his automobile. (R 6a).

And the United States Court of Appeals expressed its disapproval of that unjust and collusive judgment in this language *"we would have had no doubt, had we been the triers of fact in arriving at a judgment in favor of appellee."* Petitioner in this Court. Opinion in record and printed in Appendix B hereto, P. 14a.

Petitioner had issued its automobile insurance policy to Ralph Harris, which was obtained by his fraud and false representations, both oral and written, that he had no physical defects when he knew he had a fractured skull, which caused scar tissue on the brain, and which caused him to have epilepsy. He also swore he had crossed nerves, a physical defect, which caused his spells. (R. 47a).

Petitioner declined to pay the judgment and this suit was instituted in the same State Court to recover on the policy. It was removed to the District Court of the United States for the Western District of Tennessee, because of the diversity of citizenship and the amount involved exceeding $3000.00. The case was tried before the District Judge without a jury, who made special findings of fact and conclusions of law, and who rendered judgment in favor of petitioner.

The son was the only witness for his father. The District Court Judge, who saw him and his demeanor, when on the witness stand, made findings of fact upon the controlling issues, in favor of petitioner. Appendix B hereto, P. 3a. Judgment Appendix B hereto, P. 11a.

Therefore, the Court of Appeals did not have that important evidence seen and observed by the District Judge

before it, so as to determine the credit of the only witness for respondent, Ralph Harris, who the District Judge saw and observed, when he testified.

Material facts found by the District Court Judge, and uncontradicted, were:—

That Ralph Harris in his written application for the insurance policy represented that he had no physical defects when he had had a fractured skull and scar tissue on the brain for several years and which caused him to be an epileptic. He was treated for this for several years;

That the representations made were false and made with actual intent to deceive petitioner;

That the false representations, which were made orally, as well as in writing, increased the risk of loss under the policy, and therefore avoided the policy as a matter of law. Appendix B, hereto, P. 9a;

That the insured failed and refused to cooperate with petitioner, under the terms of the policy, and "designedly and in bad faith gave several different versions concerning material facts;" Appendix B hereto, P. 8a.

Ralph Harris voluntarily testified in the District Court that when the attorney for petitioner in the State Court learned and told him that he was an epileptic and had been treated for it, that he called him a "damn liar." (R. 48a). Respondent's attorney, for the respondent, also denied these facts until proven by a Doctor's deposition in the State Court. (R. 74b).

The District Court correctly found that according to the Statutes of Tennessee, and the decisions of the Supreme Court of Tennessee, the false representations were fraudulent and also increased the risk of loss either of which relieved petitioner of liability. (Appendix B hereto, P. 9a).

He also correctly held that the failure to cooperate relieved petitioner from liability under the decisions of the State and Federal Courts. Appendix B hereto, P. 8a.

The Sixth Circuit Court of Appeals found that:

Ralph Harris had had an injury to his head resulting in the formation of scar tissue on his brain and that that was a physical defect. Appendix B hereto, P. 16a, but that Ralph Harris did not know it, even though he was treated for it and epilepsy for almost ten years; Therefore it said he was not guilty of fraud.

That the uncontradicted testimony showed that Ralph Harris was an epileptic; Appendix B hereto, P. 17a, but that did not make his representation that he had no physical defect either fraudulent or false. The Circuit Court of Appeals said, in its opinion,

> *"That the statement of Ralph Harris, in his application for insurance, that he had no physical defect was a misrepresentation, which though innocently made, increased the risk of loss, and unless precluded by other considerations, under the Statutes of Tennessee above mentioned would avoid the policy."* Appendix B hereto, P. 17a.

But the Sixth Circuit Court of Appeals held that petitioner was precluded because the written application was not attached to the policy and that because the policy stated that it contained all of the agreements between the parties, the provisions of the Statute of Tennessee, Section 6126 of Williams Code of Tennessee, did not apply and could not be invoked by petitioner. Appendix B hereto, P. 18a. That was the same Statute referred to in the above quotation from its opinion.

The Court of Appeals said "the insured seems to have been sensitive on the point of his affliction with epilepsy, which he chose to call "spells" and he denied having epilepsy, and called the attorney handling his defense of the suit a "damn liar," which was "inexcusable and deplorable," but that the insured's false denials and conduct did not

prejudice the petitioner or prevent it from fully presenting its case before the jury. Appendix B hereto, P. 26a.

The facts showing the failure to cooperate, shown in the record by uncontradicted testimony, and those which the District Court held, as a matter of law, constituted a failure to cooperate, according to the decisions of the Federal Courts, were neither discussed nor considered by the Circuit Court of Appeals.

In the opinion of the Court of Appeals on the petition to re-hear, it is said that Ralph Harris testified one way in the State Court as to what physicians had told him, and then testified differently in the District Court. Appendix B hereto, P. 43a. This was true.

This was the same Ralph Harris that the District Judge saw and observed when on the witness stand, and whose testimony to the effect that he did not know he had epilepsy, though he had been treated for it for ten years, the Sixth Circuit Court of Appeals accepted, and set aside the finding of facts by the District Court and the petitioner insists this was done contrary to Rule 52 (a) of the Federal Rules of Civil Procedure.

Ralph Harris admitted and knew that he had a fractured skull. (R 128b). He knew he was treated for that in the early 1940s. He secured prescriptions for drugs for the treatment of epilepsy for nearly ten years, and even though the specialists who treated him testified, by deposition, that they told him and his family that he should not drive a car, he swore that they never told him and that the doctor never treated him. In the State Court, he swore that his local physician, who treated and prescribed for his epilepsy and who took him to Memphis to a specialist when his skull was fractured, told him he had "crossed nerves." When this physician was forced to testify in the District Court, he swore he did not tell him such a thing. (R. 34b). Then,

in the District Court, Ralph Harris swore that a Memphis physician told him he had "crossed nerves." (R. 47a).

But the Court of Appeals held that the fractured skull and the scar tissue on the brain could not avail petitioner as a defense because it insisted on epilepsy.

An examination of the evidence clearly reveals that petitioner's attorneys proved by physicians that scar tissue was a physical defect, and the District Court so found. It also emphasized that in its reply brief.

The petitioner also insisted that the "crossed nerves" Ralph Harris swore he had was a physical defect.

The Court of Appeals held that that was not proven a physical defect, and expressed its doubt of there being such a thing as "crossed nerves." (Appendix B hereto, P. 43a).

REASONS FOR GRANTING THE WRIT

1. The District Judge found that Ralph Harris practiced a fraud on the Tennessee Safety Department, when he obtained his driver's license on his written false statements that he was not an epileptic and had never had spells of any kind or any physical or mental defects. Appendix B hereto, P. 7a. This evidence was not contradicted even by Ralph Harris. (R. 45a). That evidences his continued fraudulent and false representations.

He also found that he practiced a fraud on petitioner by making false *oral and written* statements about his physical condition. Appendix B hereto, P. 8a.

He also found that Ralph Harris made a false written statement as to how the accident happened, to the effect that he had never had spells of any kind; that he had no prewarning or suggestion on the morning of the accident that he was about to loose consciousness. This, he always said, until placed on the stand as a hostile witness. On cross

examination of respondent's attorney, he said he was up late the night before and was drowsy and sleepy and should not have been driving; that he falsely denied to petitioner and its attorney, that any doctor had ever treated him for epilepsy or spells of any kind. His father, the respondent, also denied, in a written statement, that his son had ever had spells, (R. 103a) and respondent's attorney also denied it for him, until it was proven by the physician, who had treated him and prescribed for epilepsy for several years prior to obtaining his driver's license and the insurance policy sued on. (R. 87b). This was proven after the case was set for trial in the State Court, and only a few days before it was tried. (R. 59 b).

When respondent testified in the State Court, he testified that his son had had these spells for several years, and that his son told him he always knew when a spell was coming on. (R. 111b). In the State Court, Ralph Harris testified he had never been treated for epilepsy, (R. 118b) and did not know he had it, though he admitted to having had a fractured skull; and he also denied that the neurosurgeon who treated him for several years, ever treated him. (R. 118b, 119b, 35b, 55b).

These false statements and denials were made to conceal his true physical condition, because if the accident resulted from an epileptic seizure or a sudden loss of consciousness, there is no liability, as a matter of law.

> "A motorist stricken by a seizure or who fell asleep without being aware that he was about to lose consciousness would not be negligent as a matter of law."
>
> *Richards* v. *Parks*, 19 Tenn. App., 615
> *Wishone* v. *Yelow Cab Co.*, 97 S. W. (2d) 452

Hence those false statements and denials were important to respondent to get his case to the jury.

The District Judge saw and observed Ralph Harris and his demeanor when on the witness stand in the District Court as the only witness for his father, the respondent. He adjudged him guilty of fraud. Appendix B hereto, P. 9a.

Issues that depend upon the credibility of witnesses and the effect of weight of evidence are to be determined by the triers of fact.

Gunning v. *Cooley*, 281 U. S., 90

The Sixth Circuit Court of Appeals, who did not see or observe Ralph Harris and his manner of testifying, found practically all of the facts as did the District Court, but held that because Ralph Harris testified that he did not know, and had never been told, that he had epilepsy or physical defects, that he was not guilty of fraud. (R. 2). Printed Appendix B hereto, P. 16a.

But the Court said "The insured (Ralph Harris) seems to have been sensitive on the point of his affliction with epilepsy, which he chose to call "spells." (R. ——, Opinion P 10). Appendix B hereto, P. 26a. If he was sensitive about it, he certainly must have known it, when he signed the written statement that he had never had spells. He certainly must have known it when he told his father he knew when a spell was coming on.

The record in this case does not reveal any facts by which reasonable minds can differ as to the facts found by the District Court.

> "Finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses."

Rule 52 (a) Civil Procedure.

The Court of Appeals erroneously departed from this Rule without comment or explanation; and contrary to the decisions of this Court and other United States Court of Appeals.

> "Rule 52 of the Federal Rules of Civil Procedure providing that findings of fact shall not be set aside unless clearly erroneous, and that due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses applies to appeals by the Government as well as to those by other litigants, and there is no exception which permits the Government to ask the Supreme Court of the United States for what virtually amounts to a trial de novo on the record of findings as to intent, motive and design.
>
> "While it is the duty of the Supreme Court of the United States to correct clear error, even in findings of fact, a choice by the trier of facts between two permissible views of the weight of evidence is not 'clearly erroneous' within the meaning of Rule 52 of the Federal Rules of Civil Procedure providing that findings of fact shall not be set aside unless clearly erroneous, as where in an anti-trust suit, the evidence would support a conclusion either way, but the Trial Court has decided it to weigh more heavily for the defendant.
>
> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."
>
> *United States* v. *Yellow Cab Co.*, 338 U. S., 338; 94 L. Ed., 150
>
> *National Labor Relations Board* v. *Dinion Coil Co.*, 201 Fed. (2d) 484

The Court of Appeals disagreement with the Trial Judge on the facts does not warrant a reversal.

> *Hays* v. *Morgan*, Fifth Circuit Court of Appeals, 221 Fed. (2d) 481

The erroneous action and decision of the Sixth Circuit Court of Appeals in this case will remain unless this Court again applies Rule of Civil Procedure, 52 (a), and either approves or disapproves the law of the other Courts of Appeals in construing and applying Rule 52 (a) of the Rules of Civil Procedure.

The decision of this Court, on this question, and Rule governing civil cases is of much importance.

2. The Court of Appeals found and held that Ralph Harris, the insured, had scar tissue on the brain, and that that was a physical defect, resulting in the epileptic condition, just as the District Court found. (R. 95b, 90b). Appendix B hereto, P. 16a.

It also found "The statement of the insured in his application for insurance that he had no physical defect was a misrepresentation which, even though innocently made, increased the risk of loss; and, unless precluded by other considerations, under the provisions of the Statutes of Tennessee above mentioned would avoid the policy." Appendix B hereto, P. 17a.

But, the Court held that the application was not made a part of the policy, and the policy itself controlled and precluded the respondent as the Statute relied upon was no part of the contract of insurance. It evidently over-looked the law that the Statutes are a part of every contract.

The Statute of Tennessee, Williams Code, Section 6179 (4) requiring the application to be attached to the policy applied only to life insurance policies.

> *Jackson* v. *Loyal Ben. Assn.*, 140 Tenn., 499
> *Hancock Mutual Ins. Co.* v. *Spurgeon*, 175 Tenn., 324

and if a life insurance policy is obtained with fraudulent intent, the Statute does not apply.

> *Linder* v. *Met. Life Ins. Co.*, 148 Tenn., 244
> *Adams* v. *Manhattan Life Ins. Co.*, 24 Tenn. App., 175

"A non-disclosure of any fact which would vary the risk is regarded as fraud."

> *Catron* v. *Tenn. Ins. Co.*, 25 Tenn., 176

The Court of Appeals set aside the District Court's finding of fraud, and after holding that a misrepresentation increasing the risk of loss avoided the policy, as a matter of law, even if innocently made, held that the Statute had no application in this case, because the policy stated that it contained all of the agreements. (R. 5). Printed Appendix B hereto, P. 16a. Therefore, it held the Statute, Section 6126, had no application to this case.

This erroneous holding and decision caused the filing of a petition to rehear which cited the opinion of this Court, and that of the Supreme Court of Tennessee, to show the error of such holding. Appendix B hereto, P. 29a.

In its opinion, on the petition to rehear, no mention was made of the erroneous original decision, and no reference was made to those well established opinions of long standing.

The Statute of Tennessee relied on is Section 6126 of Williams Code of Tennessee, as follows: —

> "Misrepresentation or warranty will not avoid policy, when. No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with

actual intent to deceive, or unless the matter represented increase the risk of loss."

The Supreme Court of Tennessee has held that this same Statute and Code section is incorporated in every policy of insurance issued in Tennessee and is as much a part of it as if copied verbatim on its face, and this as a matter of law.

> *Hartford Life Ins. Co.* v. *Stallings*, 110 Tenn., 1
> *Duffer* v. *Mechanics Ins. Co.*, 95 Tenn., 245
> *Stubblefield* v. *Mutual Benefit Assn.*, 11 Tenn. App., 411

This Court held that as a matter of law, a Statute of Missouri, pertaining to insurance policies, applied and was as effectual as if it was copied on the face of the insurance policy.

> *Equitable Life* v. *Pettus Admr. of Clements*, 140 U. S., 226; 35 L. E., 497

The opinion of the Sixth Circuit Court of Appeals in this case is directly contrary to those opinions, and the established law that applicable Statutes and laws are a part of every contract, whether actually copied into it or not.

There is no other way by which petitioner can have the benefit of the unquestioned and established laws of Tennessee, where the policy involved was issued, and the benefit of this Court, except by the writ of Certiorari and decision of this Court following its prior opinions.

The Sixth Circuit Court of Appeals had already said, in its opinion, that the Statute avoided the policy in this case, if it was applicable, and certainly since the Statute as a matter of law, is a part of the policy, it is avoided.

3. The Court of Appeals set aside the finding and judgment of the District Court, relative to the lack of cooperation required of an insured, based on the facts of the record.

stated in its findings of fact and conclusion of law Appendix B hereto P. 8a, which are not clearly erroneous, but sustained by the testimony of witnesses, who testified in open Court, and whom the District Judge saw and observed.

After finding that the insured made false representations, oral and written, to respondent, and falsely denied the true facts relative to the accident; and after finding that he testified differently about his physical condition and defects in the State Court and in the District Court, and when the uncontradicted record shows that he made statements to respondent's attorney which were untrue, right up to being put on the witness stand in the State Court, as a hostile witness; and then, when he testified, swore differently to what he had said orally and in writing; and after finding that the insured called the attorney representing his defense a "damn liar," the Court of Appeals held that petitioner was not prejudiced, and that the insured had not failed to cooperate, as a matter of law, as required by the policy.

That holding not only conflicts with the law of a prior opinion of the United States Sixth Circuit Court of Appeals, but also conflicts with opinions of at least three other United States Courts of Appeals on the question as to what constitutes, as a matter of law, sufficient lack of cooperation to avoid a recovery on the policy.

The United States Court of Appeals for the Tenth Circuit defined the cooperation required, as follows: —

> "Cooperation means that there shall be a fair and frank disclosure of information reasonably demanded by the insurer to enable it to determine whether there is a reasonable defense."
>
> "A deliberate and wilful falsification of material facts violate the terms of these insurance contracts."

The insured, in this case, either deliberately and wilfully gave a false written statement to petitioner shortly after the

accident, or he swore falsely when on the witness stand. But by swearing as he did in the State Court, he not only assisted his father's case before a jury, but swore contrary to facts which he previously stated to petitioner and the attorney representing his defense.

U. S. F. & G. Co. v. *Wyer*, 60 Fed. (2d) 856

The Eighth Circuit Court of Appeals is in accord with that opinion.

General Casualty Co. v. *Kierstead*, 67 Fed. (2d) 523

Certiorari was denied in that case.

287 U. S., 647

The Fourth Circuit Court of Appeals held: —

> "Cooperation, as used in an automobile insurance policy, means that there shall be a fair, full and accurate disclosure of facts, by the assured. Deliberate and willful falsification of material facts by the assured constitutes a violation of the terms of a policy of automobile liability insurance."

State Auto. Ins. Co. v. *York*, 104 Fed. (2d) 730

The Sixth Circuit Court of Appeals agreed with the other Courts of Appeals in the case of *Ocean Accident and Guarantee Corp.* v. *Lucas*, 74 Fed. (2d) 115, but its opinion in this case conflicts with those other Circuit Court of Appeals.

It is of great importance to the insurance companies and to the public to know whether the facts of this case and as found by the District Court, constitutes a breach of the policy, as a matter of law, as held by at least three other Circuit Courts of Appeals.

Respondent's rights can rise no higher than those of his son, the insured.

> *Horton* v. *Emp. Liability Co.*, 179 Tenn. 220
> *Jamison* v. *New Amsterdam Co.*, 36 Tenn. App., 267

4. Tennessee Statute, Williams Code, Section 6126, has two provisions: (1) where either written or oral misrepresentations are made with actual intent to deceive, or (2) where the matter represented increases the risk of loss.

The Court of Appeals found that the written application was not a part of the policy and could not be considered. It also found that the oral and written misrepresentations were not made with actual intent to deceive, because, and solely because, Ralph Harris testified in the District Court that he did not know of scar tissue on the brain, and did not know that he had epileptic spells, even though he admitted that he had been treated for his skull fracture and had taken drugs for about ten years for the spells.

It also found that Ralph Harris was sensitive about his epileptic condition. He could not have been sensitive had he not known it. He had to know of his spells or he could not have told his father he knew, in advance, when they were coming on. But notwithstanding these facts, the Court set aside the District Judge's finding of fraud, because Ralph Harris testified he did not know of the spells. And it found that he swore differently in the two Courts in which he testified.

> "It is a rule of law that if a witness swears knowingly false about any material fact in issue he is wholly discredited and should not be believed on any fact."
>
> *Zachary* v. *State*, 66 Tenn., 1

> "The testimony of a discredited witness contradicted by former testimony will not be received as substantial

> evidence and is only considered, if at all, in determining the credibility of the witness."
>
> *Cavert* v. *State*, 158 Tenn., 531
> *Davis* v. *Mitchell* (Tenn.) 178 S. W. (2d) 889

The Court of Appeals accepted the testimony of this witness that he did not have epilepsy nor any physical defect; that he knew of or had ever been told of.

As a matter of law, his testimony is not substantive evidence in Tennessee and the District Court placed no value to it.

The Court of Appeals also held that the misrepresentations both the oral and written, increased the risk of loss, but did not distinguish or comment on the applicable law when the misrepresentations were innocently made and increased the risk of loss. It simply held that the Statute had no application because the policy stated it contained the agreement of the parties.

As hereinbefore stated, the Supreme Court of Tennessee held that the Statute is a part of the contract "just as much as if written on the face of the policy."

This Court held the same thing as to a Missouri Statute in the case of *Equitable Life* v. *Pettus Admr. of Clements*, 140 U. S. 225, supra.

This holding of the Court of Appeals is contrary to and conflicts with those opinions. It also fails to recognize the construction of the Statute and the effect that innocent misrepresentations avoid the policy, as a matter of law, if they increase the risk of loss.

> "If a misrepresentation is relied on by the insurer and is material to the risk, the misrepresentation avoids the policy, whether the representation is intentional or made by mistake in good faith."
>
> *Boyd* v. *Insurance Co.*, 90 Tenn., 212
> *Insurance Company* v. *Lauderdale*, 94 Tenn., 635

"A false representation which increases the risk may avoid the policy even though made in good faith."

Columbian Life v. *Harrison*, 12 Fed. (2d) 986
Robins v. *N. Y. Life*, 18 Tenn. App., 70

"Representations do not have to be with intent to deceive, if it increases the risk."

Standard Life Ins. Co. v. *Strong*, 19 Tenn. App., 404

"A representation, as would naturally and reasonably influence the insurer, avoids the policy."

Commercial Standard Insurance Co. v. *Paul*, 35 Tenn. App., 394
Little v. *Washington Insurance Company*, 34 Tenn. Appeals, 593

"Whether misrepresentation increases the risk assumed is a question of law for the Court, either under Statute or at common law."

Norvill v. *Mutual Benefit Association*, 14 Tenn. App., 396
Mutual Life Ins. Co. v. *Debrell*, 137 Tenn., 538
National Life & Accident Co. v. *Lewis*, 89 S. W. (2d) 898 (Tenn.)

The Court of Appeals found and held that the facts were sufficient to defeat a recovery under Tennessee Code, Section 6126, but which could not be considered because of the policy provisions. When this error was pointed out in the petition to rehear by the opinion of this Court and that of the Tennessee Supreme Court, the Court of Appeals declined to comment on this law.

These errors can be corrected only by this petition being granted and these, and the other errors of law, herein pointed out, corrected by this Court.

What is believed to be an unjust, and collusive judgment between father and son, contrary to the legal principles cited, and one which the Court of Appeals said it would not have rendered if it had tried the facts, can be relieved and justice done by this petition being granted.

The District Judge tried the facts, and applied the law, and his finding is not clearly erroneous as is required by Rule 52 (a) before it should be set aside.

That finding by the District Judge should be followed under Rule 52 of the Federal Rules of Civil Procedure, as construed in *United States* v. *Yellow Cab Company supra*, and the Court of Appeals reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. HALL,
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Memphis 3, Tennessee,
Attorney for Petitioner.

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Columbian Tower,
Memphis, Tennessee
SAM C. NAILLING,
Union City, Tennessee,
ROBT. P. ADAMS,
Trenton, Tennessee,
Of Counsel.

APPENDIX B

to

PETITION FOR CERTIORARI

In the

DISTRICT COURT OF THE UNITED STATES
For the Western District of Tennessee
Eastern Division

No. 856—Civil

OMER M. HARRIS,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

(Filed January 31, 1955)

This is a suit brought by the plaintiff, Omer M. Harris, against the defendant, State Farm Mutual Automobile Insurance Company to recover on a judgment which the plaintiff obtained against his son, Ralph Harris, insured, under an automobile liability insurance policy issued by the defendant. The judgment aforesaid was recovered by the plaintiff as the result of an automobile accident while he was riding as a guest.

Plaintiff bases his right to recover in this suit on the following provisions of the policy herein:

> "I. Coverage A.—Bodily Injury Liability—
> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages cause of bodily injury, sickness, or disease, including death at any time resulting therefrom, sustained

by any person, caused by accident and arising out of the ownership, maintenance or use of the automobile.

CONDITIONS

"4. Action Against Company—
Coverages A and B—No action shall lie against the company unless, as a condition precedent thereto the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

"Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability."

The State Farm Mutual Automobile Insurance Company, declined to satisfy the judgment rendered against the insured, Ralph Harris, on the grounds that he had procured the contract of insurance herein by fraud and misrepresentation and failed to co-operate with the defendant in the preparation and defense of the action commenced against him.

In this connection, the defendant asserts that Ralph Harris violated the following provisions of his policy:

"Action Against Company—Coverages A and B—

"No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy * * *

"13. Assistance and Co-operation of Insured.

"The insured shall co-operate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits * * *"

Defendant also relies upon Section 6126 of Williams Code of Tennessee, which reads as follows:

"No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material to defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

The Court, upon the pleadings, evidence, briefs and arguments of counsel, makes the following:

FINDINGS OF FACT

I.

On March 16, 1950, Ralph Harris, of Troy, Obion County, Tennessee, made and signed a written application for automobile liability insurance with the defendant in which, among other things, he represented he had no physical defects. Relying upon such representation, the defendant insurance company issued to Ralph Harris the policy herein, effective March 16, 1950. The renewal of the contract of insurance was in existence on November 10, 1952, the date of the accident in Union City, Tennessee, in which the plaintiff was injured as aforesaid. Under the terms of the policy so issued, the application for same became a part of the insurance contract sued on in this case.

II.

While the defendant company was in the process of making an investigation of this accident, it received inconclusive information that the insured, Ralph Harris, had been subject to epileptic seizures for many years, and that the accident herein was probably due to such a seizure. Upon obtaining this information, the defendant, on December 12, 1952, took from the insured, Ralph Harris, a non-waiver agreement, continued its investigation and thereafter undertook the defense of the original suit filed against its insured in the Circuit Court of Obion County, Tennessee.

III.

At the time Ralph Harris signed the within application for insurance he had for many years prior thereto suffered from and well knew he was subject to epileptic spells.

Early in the year 1940, and continuing at intervals thereafter, the insured suffered with epileptic attacks. On account of this impairment, his local physician, between the years 1940 and 1949, referred him to neuro-surgeons in Memphis, Tennessee, who treated him for this condition by prescribing medication.

A short time after the accident of November 10, 1952, and within two weeks of his release from the hospital, Ralph Harris had three epileptic seizures characterized by Dr. Raskind as "grand mal" and "petit mal".

Early in 1954, on Highway No. 51, two and a half miles north of Troy, Tennessee, Ralph Harris, while driving alone in his car, was involved in another accident similar to the one of November 10, 1952. On being interviewed at a Clinic later that day, he stated to the investigating officer that "he didn't know what happened, that he apparently went to sleep at the wheel".

IV.

Scar tissue on the brain is a physical defect. It exerts a pressure on the central nervous system and causes epilepsy. Ralph Harris, the insured, at the time he applied for the policy herein, on March 16, 1950, had a physical defect which he concealed from the defendant.

The accident of November 10, 1952, which resulted in injury to the plaintiff herein, was the direct and proximate result of an epileptic seizure of the insured, the driver of the automobile insured under the within policy.

V.

The representation in the application for insurance herein by Ralph Harris that he had no physical defects was false and was made with actual intent to deceive the defendant insurance company. Had the defendant Company known that the insured was addicted to epilepsy at the time the application for insurance herein was made, it would not have issued the policy upon which this suit is based. Insured's false representations aforesaid also increased the risk of loss under the policy.

VI.

In 1947, Ralph Harris, in his written application for a Tennessee Driver's license, stated falsely that he had never suffered from epilepsy, fainting or dizzy spells, and had no physical or mental defects.

VII.

Upon finally determining that insured, Ralph Harris, at the time the policy herein was applied for, had a physical defect, in that he was at that time a chronic epileptic, the

defendant insurance company, on July 23, 1954, gave Ralph Harris written notice that it was disclaiming all liability under the policy in question and was refusing to pay any judgment that had been rendered against him arising out of the accident of November 10, 1952. It enclosed with said written communication refunds to him of all premiums.

VIII.

The insured, Ralph Harris, failed and refused to co-operate with the defendant under the terms of the within policy in the following particulars, among others:

1. He refused to co-operate in effecting a settlement of his father's claim, stating he would not permit his father, this plaintiff, to accept a suggested offer of settlement.

2. He denied that he was, or had ever been, an epileptic, or that he suffered an epileptic attack at the time of the accident on November 10, 1952, in Union City, Tennessee.

3. He refused to authorize defendant's counsel to obtain a statement from Dr. Raskind, one of his physicians, as to his true physical condition.

4. He, designedly and in bad faith, gave several different versions concerning material facts leading up to the accident on November 10, 1952, and as to how the accident occurred, all to the prejudice of the defendant's rights.

5. He failed and refused to co-operate with defense counsel in the actual trial of his father's case in the Circuit Court of Obion County.

6. He was hostile to the interests of the defendant insurance company in the trial of his father's case in the Circuit Court of Obion County, Tennessee.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter of this action.

II.

The plaintiff's rights herein are derivative, rising no higher than those of the insured under the insurance contract in this case.

Jamison v. New Amsterdam Cas. Co., 36 Tenn. App. 267;
Horton v. Emp. Lia. Assur. Corp., 179 Tenn., 220.

III.

The defendant has carried the burden of showing that the insured was guilty of misrepresentation in procuring policy of insurance herein and, on this account, said policy is void ab initio. The insured, in negotiations, and in his application for the within policy, made material false representations concerning his physical defects, with actual intent to deceive and such representations did deceive the defendant in this case and did increase the risk of loss under its policy of automobile insurance.

Sec. 6126, Wms. Code of Tenn.
Standard Life Ins. Co. v. Strong, 19 Tenn. App. 404.
Mut. Life Ins. Co. v. Dibrell, 137 Tenn., 528.
Vol. State Life Ins. Co. v. Richardson, 146 Tenn., 589.

IV.

The defendant insurance company has shown by the preponderance of the evidence that the insured herein,

Ralph Harris, in the defense of the action brought against him by his father, the plaintiff in this case, in the Circuit Court of Obion County, Tennessee, did not, as required by the policy, co-operate in a proposed settlement of the claim asserted, or make fair and frank disclosures in good faith concerning material information, reasonably demanded by the defendant, so as to enable defendant to determine whether there was a genuine defense to such suit, or so that the defendant might make proper preparations, and take proper steps in the necessary defense of same, all to the great prejudice of the defendant's rights.

Ocean Acc. & Guarantee Corp. v. Lucas, 74 Fed. 2d 115, (6th Cir.).

State Automobile Ins. Co. v. York, 104 Fed. 2d 730 (4th Cir.).

V.

Because of the false representations and lack of co-operation on the part of the insured, as herein found, no rights have accrued to the plaintiff under the policy sued upon in this case. The complaint is dismissed at the plaintiff's costs.

ORDER FOR JUDGMENT

Judgment in accordance with the foregoing Findings of Fact and Conclusions of Law will be entered within five days.

(s) Marion S. Boyd,
United States District Judge.

1-31-55

In the

DISTRICT COURT OF THE UNITED STATES
For the Eastern Division of the Western District
of Tennessee.

Civil Action No. 850

OMER M. HARRIS,

Plaintiff,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant.

JUDGMENT

(Filed February 4, 1955)

This cause came on to be heard before the Honorable Marion S. Boyd, Judge of the District Court of the United States for the Eastern Division of the Western District of Tennessee, on January 15, 1955, a jury which had been called for by the plaintiff, having been waived by him, with the consent of the defendant, and the same was heard upon the pleadings, the testimony of witnesses introduced in open Court, the depositions on file, the exhibits introduced in evidence, and the entire record, together with briefs and arguments of counsel for the respective parties, from all of which it appeared to the Court that this suit was brought by the plaintiff in the Circuit Court of Obion County, Tennessee, to recover on an automobile insurance policy issued to his son, Ralph Harris, and against whom plaintiff had recovered judgment in the Circuit Court of Obion County, Tennessee, and which on appeal to the Court of Appeals of Tennessee was affirmed.

The suit was seasonably removed to this Court which has jurisdiction of the parties and subject matter.

The Defendant, State Farm Mutual Automobile Insurance Company, declined to satisfy the judgment rendered against the insured Ralph Harris, on the grounds that Ralph Harris made false and fraudulent misrepresentation in the negotiations for and in the application for the insurance policy sued on in this cause, and which were made with actual intent to deceive and that the matters represented increased the risk of loss; and also on the ground that Ralph Harris failed to cooperate with it as required by the terms and provisions of the insurance policy.

It appeared to the Court that Ralph Harris made false and fraudulent misrepresentations in the negotiations for and in the application for the insurance policy sued on in this cause and that he made them with actual intent to deceive, and that they did deceive the defendant, and that the matters represented increased the risk of loss and all as stated in the findings of fact, conclusions of law and order for judgment filed January 31, 1955, and that the insurance policy sued on in this cause was void ab initio and it is so adjudged and decreed.

It further appeared to the Court that Ralph Harris failed and refused to cooperate with the defendant insurance company as required under the terms and provisions of the insurance policy sued on in this case and that the plaintiff's rights rise no higher, under the insurance contract, than those of the insured Ralph Harris, and all as stated in the findings of fact, conclusions of law and order for judgment filed January 31, 1955, and which is made a part of this order as fully as if copied herein, and all of which is so adjudged and decreed by the Court.

It is further ordered, adjudged and decreed by the Court that the plaintiff's suit be and the same is hereby

dismissed and judgment is rendered against the plaintiff, Omer M. Harris, and the sureties on his prosecution bond for all of the costs of this cause and for which execution may issue.

The plaintiff, Omer M. Harris excepted to the foregoing order, judgment and decree.

Enter:
(s) Marion S. Boyd,
Judge.

A True Copy. Attest:
W. Lloyd Johnson, Clerk.
By (s) L. B. Strummiger, D. C. (SEAL)

CAUSE ARGUED AND SUBMITTED

December 13, 1955 — Before: Simons, Chief Judge, Allen and McAllister, Circuit Judges.

This cause is argued by Charles W. Miles, III and Carmack Murchison for appellant and by Robert P. Adams for appellee and is submitted to the court.

JUDGMENT

(Filed February 29, 1956)

Appeal from the District Court of the United States for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case remanded to the District Court for entry of a judgment in favor of appellant, as set forth in the complaint in the District Court.

No. 12492

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

OMER M. HARRIS,
Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Tennessee, Eastern Division.

ORIGINAL OPINION OF COURT OF APPEALS

(Decided February 29, 1956.)

Before SIMONS, Chief Judge; ALLEN and MCALLISTER, Circuit Judges.

MCALLISTER, Circuit Judge. Omer Harris, appellant, while riding as a passenger in an automobile owned by his son, Ralph, was injured when the car went out of control and ran into an enbankment. He brought a negligence action against his son and recovered a judgment for personal injuries in the amount of $15,000 in the state court of Tennessee. The son, Ralph, was insured by appellee company against liability to the extent of $10,000. Appellent thereafter sued the insurer for this amount in the state court; and the suit was removed to the district court and tried before the district judge without a jury. The court filed findings of fact, conclusions of law, and entered

judgment of dismissal; and from such judgment, Omer Harris appeals.

Appellee insurance company defended the action on several grounds. It contended that the insured was guilty of making false representations in his application for insurance with intent to deceive the insurance company; and, further, that, by reason of such false representation, the risk was increased, and the company thereby damaged. Appellee further defended upon the ground that Ralph Harris, the insured, failed and refused to cooperate with the insurance company, as required by the policy provisions, in order to enable the company to make proper preparation of its case to determine whether there was a guenuine defense and in negotiations for settlement.

The false representation claimed to have been made by Ralph Harris in his application for the policy of insurance was that, in reply to a question whether he had any physical defect, he answered, no. Appellee insurance company introduced evidence that he suffered from epilepsy. Appellant contended that epilepsy was not a physical defect but a disease. The insurance company contended that it was a physical defect. After much expert testimony which evaded the real question, the trial judge, during examination of the insurance company's principal expert witness, Dr. R. M. Darnell, went to the crucial point with the question:

> "Doctor, in the medical sense, would epilepsy be classified as a physical defect?
>
> "A. Well, sir, we consider epilepsy as a symptom complex of an illness, and not as a physical defect in itself."

In the light of this expert medical testimony from the insurance company's witness, which was uncontradicted, the fact that Ralph Harris had epilepsy did not render

fraudulent or false the answer in his application for insurance, that he had no physical defect.

It appears, however, from the evidence, that some ten years before he applied for the policy of insurance, Ralph Harris had received head injuries in an automobile accident which had resulted in the formation of a scar on his brain tissue. According to the medical witnesses, such a scar, in some cases, affects one's mental condition, and in some cases, it does not, but in the expert opinion of a neurosurgeon who had examined Ralph Harris several times after the accident, the scar on his brain tissue was the cause of a convulsive disorder from which he suffered on repeated occasions. The convulsive disorder was epilepsy. It appeared that a driver's license would not be issued by the state to anyone who was known to be suffering from epilepsy. The insured stated that he had nothing more than "crossed nerves" which had caused him to have "spells." There is no evidence that any physician or anyone else told him he had crossed nerves, which, as far as the evidence goes, is a nonexistent condition. As to the scar on the brain, it was revealed to the neurosurgeon by an X-ray film. This was a physical defect. But Ralph Harris was never told by anyone that he had a scar on his brain and did not know it.

Section 6126 of Williams Code of Tennessee provides:

> "No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

The district court found that scar tissue on the brain is a physical defect; that it exerts pressure on the brain and

causes epilepsy; that the statement in the application for insurance by Ralph Harris setting forth that he had no physical defect was false; that such representation increased the risk of loss under the policy; that Ralph Harris suffered from epileptic seizures; and that the insurance company would not have issued the policy if it had known the true facts.

In *Columbian National Life Ins. Co.* v. *Harrison, et al.*, 12 F. 2d 986 (C. C. A. 6), Judge Denison, in speaking for the court, held that a false representation in an application for insurance, which increased the risk, avoided the policy, under the statute of Tennessee above set forth, even where the representation was made in good faith. In view of circumstances hereinafter discussed, it is to be noted that in the Harrison case, *supra*, the express terms of the insurance policy set forth that it was issued in consideration of the statements made in the application, and that such statements were actually copied into, and incorporated in the policy itself, which is contrary to the facts in the instant case. See *Standard Life Ins. Co. of the South* v. *Strong*, 19 Tenn. App. 404, 89 S. W. 2d 367; *Robbins* v. *New York Life Ins Co.*, 18 Tenn. App. 80, 72 S. W. 2d 788; *Insurance Co.* v. *Lauderdale*, 94 Tenn. 635; *Boyd* v. *Insurance Co.*, 90 Tenn. 212; *Catron* v. *Tennessee Ins. Co.*, 25 Tenn. 175. Whether a representation results in an increase of risk is a question of law for the court. *Volunteer State Life Ins. Co.* v. *Richardson*, 146 Tenn. 589; *Mutual Life Ins. Co.* v. *Dibrell*, 137 Tenn. 528. See *American Eagle Fire Ins. Co.* v. *Peoples Compress Co.*, 156 F. 2d 663 (C. C. A. 10).

The statement of the insured, in his application for insurance, that he had no physical defect was a misrepresentation which, even though innocently made, increased the risk of loss; and, unless precluded by other considerations, under the provisions of the statutes of Tennessee, above mentioned, would avoid the policy.

However, an insurance policy is a contract, and, as in other contracts, the fundamental question to be determined is what was the real intention of the parties. *Milwaukee Mechanics Ins. Co.* v. *Davis*, 198 F. 2d 441 (C. A. 5). "Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense, unless such terms have acquired a different and technical sense in commercial usage or unless it clearly appears from the context that it was the intention of the parties to use such terms in a technical or peculiar sense." 29 Am. Jur., Section 159. We are interpreting a contract and are concerned only with the sense in which its words were used. *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80, 84. It is our function and duty to ascertain and effectuate the lawful intention of the parties. *New York Life Ins. Co.* v. *Bennion*, 158 F. 2d 260 (C. C. A. 10). The application for a policy is not the contract but a mere offer or proposal for a contract of insurance. *Mutual Benefit Life Ins. Co.* v. *Robinson*, 58 F. 723 (C. C. A. 8); *Metropolitan Life Ins. Co.* v. *Whitler*, 172 F. 2d 631 (C. A. 7). The application for a policy of insurance becomes a part of the contract if it is made a part thereof by the express terms of the policy; and in a number of jurisdictions, statutes have been enacted which require a copy of the application to be attached to the policy applied for. In the instant case, the application was not attached to, or incorporated in, or referred to, in the policy. In Tennessee, the applicable statute provides, insofar as here relevant, that every policy of insurance issued to any citizen of the state by any insurance company or association doing business in the state, except fraternal beneficiary association and mutual insurance companies or

associations operating on the assessment plan, or policies of industrial insurance, shall contain the entire contract of insurance between the parties to the contract.[1] Under this statute, an insurance company, unless it is within the exceptions therein specified, cannot take advantage of any breach of the terms of the application when it does not attach the application to, or incorporate it in the policy. *Arnold* v. *New York Life Ins. Co.*, 131 Tenn. 720. Appellee insurance company, however, is within the exceptions mentioned in the statute, since it is a mutual insurance company.

However in this case, the express provisions of the contract between the insured and the insurer set forth:

> "Declarations. By the acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance."

The above provision refers to the heading, "Declarations," on the first page of the policy, which set forth the name of the insured, the type of the automobile insured, the occupation of the insured, and similar information. No reference is made in the policy to the application. The agreement in the insurance contract that "this policy embodies all agreements existing between [insured] and the company" is conclusive that it is not based in any way upon the state-

[1] Section 6086 of Williams Tennessee Code, Annotated, provides: "Every policy of insurance, issued to or for the benefit of any citizen or resident of this state on or after the first day of July, 1907, by any insurance company or association doing business in this state, except fraternal beneficiary associations and mutual insurance companies or associations operating on the assessment plan, or policies of industrial insurance, shall contain the entire contract of insurance between the parties to said contract, and every such contract so issued shall be held as made in this state and construed solely according to the laws of this state."

ments in the application. Of course, a fraudulent representation in the application inducing the execution of a policy of insurance can generally be availed of to avoid the policy, just as any contract can be avoided for fraud *ab initio*. And it may well be that under Section 6086 of Williams Tennessee Code Annotated, above mentioned, the insurance company in this case, if it had not expressly agreed otherwise, could rely, as a defense, upon the statements in the application, which were false but not fraudulent, even though it had not attached the application to, or incorporated it in the policy, in view of the fact that mutual insurance companies are excepted from the requirement that the policy shall contain the entire contract of insurance. But the insurance company, in this case, in its contract of insurance, foreclosed itself from relying on the statements in the application by its stipulation that the policy itself embodied all the agreements between the company and the insured. Mere false representations in an application for insurance, as distinguished from a fraudulent inducement or procurement of a policy of insurance, cannot be relied upon when the insurance contract, by its express terms, provides that the policy itself embodies all the agreements between the parties. The application in this case was no part of the contract of insurance. By the terms of the insurance contract, the policy was issued "in reliance upon the truth of . . . representations" set forth in the policy, and not upon statements in the application. Similarly, in those cases where statutes provide that the policy shall contain the whole contract, a false but not fraudulent representation in an application for insurance cannot be relied upon to avoid a policy where the application is not made a part of the policy. See 29 Am. Jur., Section 173, and cases collated thereunder. It is our conclusion that the application by the insured was never a part of the policy.

and because of the express agreement of the parties, no statements therein can be relied upon to avoid the policy.

Appellee insurance company claims that it was relieved from liability under the policy for the reason that Ralph Harris, the insured, failed to cooperate with the insurer, as required by the policy provisions. It contends that a comparison of the insured's written and oral statements before the trial in the state court, with his sworn testimony in that trial, together with his attitude and conduct preceding and during that trial and his deliberate and willful falsification of material facts, shows insured's complete failure to cooperate with the company.

In support of its contention, the company submits that the insured denied having been an epileptic, or having a physical defect, until the trial of the personal injury action in the state court. It appears that, prior to the execution of the policy, the insured was not asked whether he suffered from epilepsy, and such a representation was not included in the application for insurance. As far as a physical defect goes, epilepsy is not, according to the undisputed evidence of the insurance company's witnesses heretofore mentioned, a physical defect. The insurance company shows that in the statement given by Ralph Harris to the claim agent after the accident in which appellant was injured, Ralph stated: "I had . . . my complete facilities about me, and my mind functioning as usual. . . . I must have dropped off to sleep at this very time . . . I have been driving for about fifteen years, and this is the first time I have ever gone to sleep at the wheel of a vehicle. I have never been subject to any spells of drowsiness, or otherwise, at any time." This statement was drawn up by a claim agent of the insurance company and signed by Ralph.

It is claimed by the insurance company that contrary to his written statement, the insured testified thereafter that he had been drowsy and dropped off to sleep. It appears

that he had told his physician after he recovered consciousness that he did not know what happened, but that he "reckoned I just went to sleep, I just don't know." On the witness stand, he testified: "I was sleepy and drowsy that morning." It is insisted that these statements were a willful falsification of the facts and misled the insurance counsel in preparing for trial in that he had previously told him that he had no warning whatever that he was "going to lose consciousness." It appears, then, that the insured told his physician at the hospital, when he first discussed the accident, that he thought he had fallen asleep. He told the claim agent he must have dropped off to sleep. He told counsel for the insurance company before the trial that he suddenly lost consciousness and fell asleep; and he testified on the trial that, as far as he knew, he just went to sleep. As to appellee's claim that the insured had told counsel that he had no warning that he was going to fall asleep, and afterward contradicted this statement by saying that he was a little drowsy, the insured, being pressed on this point, on examination by counsel for the insurance company, testified: "I had no warning whatsoever other than drowsiness and sleepy. Is that warning? What would you say that is?

From the foregoing, it cannot be said that the insured failed to cooperate by testifying that he was drowsy and had fallen asleep instead of testifying that he had lost consciousness suddenly. Moreover, in spite of the insured's insistence that he did not have spells or epileptic seizures, the insurance company was not prejudiced in introducing the most comprehensive proofs from the doctors who had treated the insured and from the insured's father who was the plaintiff in the personal injury case, that the insured had suffered from epileptic attacks. Thus, in the statement given to the claim agent, Ralph told that Dr. Leigh K. Haynes was the physician who treated him after the accident, and he authorized the counsel for the insurance company to inter-

view and discuss the matter with Dr. Haynes; and, from Dr. Haynes, counsel for the insurance company learned all about the epileptic attacks from which Ralph suffered. He also learned from Dr. Haynes that Dr. Raskind, the neurosurgeon, had treated Ralph; and from Dr. Raskind, counsel further learned of the scar on Ralph's brain tissue and the treatment which was administered for the repeated attacks of epilepsy from which he suffered. On the trial, Ralph's father, appellant herein, testified as to these epileptic seizures. Ralph himself testified that he had spells, but denied that they were epileptic—although he could have had no knowledge as to whether a spell is epileptic or not. During the trial in the state court, counsel for the insurance company, who was also representing Ralph, introduced in evidence the depositions of Dr. Haynes and Dr. Raskind disclosing that Ralph had repeatedly suffered from epilepsy. The defense of the law suit, by the insurance company, was not prejudiced by the need of proof that the insured had epileptic seizures; and this was practically the sole defense relied upon in the state court suit for personal injuries brought by appellant against his son, Ralph. In that suit, the issue was whether, at the time the car ran into the embankment, Ralph suffered an epileptic seizure or fell asleep. If he suffered an epileptic seizure, he would not have been guilty of negligence and no verdict for damages could have been returned. Appellant's claim was based on the theory that the accident happened when Ralph fell asleep. This issue was strenuously contested in the state court.

In the state court, the trial judge, in his charge to the jury, instructed them that if they found that Ralph Harris had lost control of his automobile by going to sleep and causing the car to crash into the embankment, and if they found that he had omitted to do something that an ordinarily prudent person would have done, that would raise an

inference of negligence on his part, and, if unexplained or if no circumstances tending to excuse or justify his conduct were proved, he would be liable. On the other hand, the court instructed the jury that if, immediately before the crash, the insured was suddenly and without warning seized with an attack of epilepsy which made it impossible for him to control the car, and, as a result, the accident occurred, there would be no negligence and no liability. In this regard, the trial court gave the following special instruction:

> "I further charge you, gentlemen of the jury, that if you should find that the defendant was an epileptic and that this fact was known to his father, but you should further find that at the time of this accident he went to sleep, not as a result of a sudden seizure of epilepsy, then I charge you that the plaintiff would not be guilty of contributory negligence in this case, if he exercised reasonable care for his own safety. . . ."

The issue before the jury, therefore, was whether the accident resulted from the insured's falling asleep or from an epileptic seizure. When the judgment awarded to appellant was appealed by the insurance company to the Tennessee Court of Appeals, that court, in its opinion affirming the judgment, stated:

> "The case as presented to the jury, turned almost exclusively on whether the accident happened as the result of Defendant's having had an epileptic seizure, in which case there would be no liability, or whether it happened as the result of his having fallen asleep at the wheel, in which case there was liability. The jury has found that it occurred as the result of his having fallen asleep at the wheel. As far as this case is concerned, that concludes the matter."

From what we can judge of the record, the insurance company was not prejudiced by anything the insured did

in presenting its proof to the jury showing that the insured was a sufferer from epileptic attacks. In fact, the matter was squarely presented during the trial of the instant case when appellant's counsel, during the testimony of the attorney for the insurance company who had taken the stand on behalf of his client, asked:

> "Q. Actually, Mr. Nailling, the point I am getting at. . . . defense of that lawsuit was never seriously handicapped at any time by the need of or adequacy of the proof that the boy had these epileptic seizures, was it, just except a little work on the part of the lawyer is all it required, wasn't it?
>
> "A. I will answer it this way. I was entitled to a full, fair and complete statement of this accident from the insured. I never did get it."

This cannot be said to be proof that any lack of cooperation or discrepancies in statements by the insured were prejudicial in effect. About the only additional proof that appellee company could have adduced in presenting its case was an outright admission from the insured that the accident happened while he had an epileptic seizure; and it is conceded by the medical expert witnesses of the insurance company that the insured would not have been able to remember whether he had fallen asleep or suffered an epileptic attack. "It is well settled that, to relieve the insurer of liability on the ground of lack of cooperation discrepancies in statements by the insured must be made in bad faith and must be material in nature and prejudicial in effect." *State Automobile Mut. Ins. Co. v. York*, 104 F. 2d 730, 733 (C. C. A. 4).

In sum, while the question whether the insured fell asleep or suffered an epileptic attack was for the jury in the state court trial, the proofs that the accident resulted from an epileptic seizure were so strong and persuasive and so ably marshalled and advanced by counsel for appellee that we

would have had no doubt, had we been the triers of fact, in arriving at a judgment in favor of the appellee. From all of the foregoing, we cannot say that appellee was prejudiced by any statements of the insured, in presenting its proofs, to the effect that the accident happened as the result of an epileptic seizure, for it knew all the facts and circumstances surrounding the susceptibility of the assured to such attacks, before the actual trial of the case.

With regard to the question of the cooperation of the insured with the insurer, there is one disturbing circumstance. When preparing for trial, counsel for the insurance company asked the insured why he had not informed them that he had epilepsy. The insured heatedly replied that he did not had epilepsy and that counsel was "a damn liar." Counsel is an outstanding lawyer of integrity and reputation, as well as ability, as his conduct of the various trials relating to this accident and liability therefor demonstrate, and he was, at all times, engaged in faithfully and honestly representing the interests of his client. The insured seems to have been sensitive on the point of his affliction with epilepsy, which he chose to call spells; but such language by the insured to an honorable member of the bar engaged to defend both the insured and the insurer, is inexcusable and deplorable. Yet the crucial consideration is not whether, on this occasion, there was unjustifiable language used by the insured in speaking to counsel for the insurance company, but whether the insured's conduct prejudiced the company or prevented it from introducing its proofs and fully presenting its case before the jury; and it is our conclusion that it did not.

Other claimed false statements by the insured during preparation for trial were not prejudicial to the insurance company in the presentation of its case to the jury. "The mere inadequacy or untruthfulness of a statement made by the assured to the insurer as to the circumstances of an

accident does not of itself necessarily constitute a breach of a cooperation clause." *Rochon* v. *Preferred Accident Ins. Co.*, 118 Conn. 190, 171 A. 429, 98 A. L. R. 1472. And the fact that the insured stated he would never permit his father to settle for the amount of his medical expenses cannot be held to be a failure to cooperate, especially since such an offer was never more than contemplated by the counsel for the insurance company, and no offer was ever made by the company.

On our review of the whole case, it may be said that if epilepsy were a physical defect instead of a disease, the insured's representation that he had no physical defect would have supported a finding of fraudulent misrepresentation to the insurance company, avoiding the policy. If the application wherein the insured innocently stated that he had no physical defect had been made a part of the "Declarations" of the policy of insurance, it would have also avoided the insurance because, though innocent, it was false, and increased the risk. To avail itself of insured's statement that he had no physical defect, the insurance company would either have to show that it was made with intention to defraud, or that such representation was a part of the policy.

If it were not for certain procedures of the insurance company, it would seem strange that no inquiry was made as to whether the applicant was subject to epilepsy or similar afflictions, before issuance of a policy; but it appears that while this is information that is of paramount interest to the insurance company, as is also information with respect to an applicant's drinking habits, whether he is emotionally stable, of sound mind, and of good moral character, no questions are asked with respect to any of these matters, inasmuch as the company generally relies upon the agent and upon a private investigation of each applicant, which was not made in this case. The reasons given why such an investigation was not made were because the mileage—

or travel expense—required for the investigation was excessive; and that the agency issuing the insurance had been profitable, it appearing that the company investigates more readily applications made to an agency which has been unprofitable.

It is our conclusion that there was no proof that the insured, by any statement in his application, was guilty of fraudulent misrepresentation inducing the contract of insurance; that the statement that the insured had no physical defect was not a part of the insurance contract relied upon by the insurer; and that there was no failure to cooperate on the part of the insured to the prejudice of the insurance company.

In accordance with the foregoing, the judgment of the district court is reversed and the case remanded for entry of a judgment in favor of appellant, as set forth in the complaint in the district court.

In The

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

No. 12492

OMER M. HARRIS,
Plaintiff-Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellee.

PETITION OF DEFENDANT-APPELLEE FOR A REHEARING

May It Please The Court:

In an opinion filed February 29, 1956, this Honorable Court reversed the District Court for the Eastern division of the Western District of Tennessee, and entered judgment accordingly, thereby holding that the plaintiff and appellant was entitled to a recovery in this case.

In its opinion certain material facts are found contrary to the uncontradicted evidence; some material and pertinent facts are not discussed which, we respectfully submit, shed much light on the legal principles involved, including the applicable Statutes and decisions of State and Federal Courts, some of which were not cited in original brief, which are believed to be controlling, are not discussed. Appellee is much aggrieved by the decision of this Honorable Court and for these reasons, and in view of the effect that it has on automobile insurance policies and lawsuits,

in general, and particularly the often seen collusion of and failure to cooperate, even to the extent of lying, by an assured, appellee respectfully requests a reconsideration of some of the facts and law and that it be granted a re-hearing in this cause.

On page ten of the opinion, this Honorable Court says, in part, "*we would have had no doubt, had we been the triers of fact, in arriving at a judgment in favor of the appellee.*"

And now should appellee suffer a judgment against it on an unwarranted and unjust judgment in favor of the father against the son on the facts of this record?

The Court of Appeals of Tennessee held that it could not reverse because the jury verdict was concurred in by the State Trial Judge, under the scintilla evidence rule, but it also suggested that the defenses relied on would be available if suit was brought to recover against appellee.

VARIANCE BETWEEN THE EVIDENCE AND CERTAIN FACTS STATED IN OPINION

A. On page two of the opinion it is said "There is no evidence that any physician or any one else told him he had crossed nerves, which as far as the evidence goes, is a non-existent condition."

Ralph Harris testified in State Court "I have been subject to spells: I have had crossed nerves." (Appellant's Appendix 61a)

Ralph Harris testified in the District Court "He (referring to Dr. Semmes) told me that I had crossed nerves." (Appellee's Appendix 122b)

Thus it is seen that *Ralph Harris swore that Dr. Semmes, his physician, told him he had "crossed nerves."* And he swore he had "crossed nerves."

If nerves are crossed, it is certainly a physical defect and

which Ralph Harris swore he knew, when he applied for and obtained the liability insurance.

Ralph Harris swore in the State Court that he had a skull fracture in the early 1940s. (Appellee's Appendix 128b) and was taken to Dr. Semmes. Certainly a fracture of the skull is a physical defect. Ralph Harris knew it when he obtained the liability insurance.

On page six of the opinion, the Honorable Court says that the company "foreclosed itself from relying on the statements in the application by its stipulation that the policy itself embodied all the agreements between the company and the insured. Mere false representations in an application for insurance, as distinguished from a fraudulent inducement or procurement of a policy of insurance, cannot be relied upon when the insurance contract, by its express terms, provides that the policy itself embodies all the agreements between the parties."

NEW AND CONTROLLING AUTHORITIES

This Court correctly held that the misrepresentation made by Ralph Harris increased the risk of loss. It also held that would defeat a recovery. As provided by Section 6126 of Williams Code of Tennessee, were it not for the "Declarations" provision of the insurance contract policy, (Opinion pages 5, 6) which *precluded* appellee from relying on said Section 6126 of the Tennessee Code.

Appellee most respectfully submits that that holding in this case is erroneous in that the Supreme Court of Tennessee has held that Section 6126 of the Tennessee Code is incorporated in every policy of insurance issued in Tennessee, and is as much a part of it as if copied on its face.

Stubblefield v. *Mutual Benefit Assn.*, 11 Tenn. App., 411
Hartford Life Ins. Co. v. *Stallings*, 110 Tenn., 1
Dugger v. *Mechanics Ins. Co.*, 95 Tenn., 245

In accord:

Equitable Life v. *Pettus, Adm. of Clements*, 140 U. S. 226; 35 L. E., 497
Hermany v. *Fidelity Mut. Life*, 151 Penn St., 17

Being a part of the insurance contract, as a matter of law, the "Declarations" provision of the policy does not preclude appellee from relying on the provisions of the Statute.

The same applies to Section 6086 of Williams Tennessee Code referred to on page 5 of the opinion.

And again that section of the Code quoted on page 3 of the opinion says "*no written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application.*"

Thus it is seen that the Statute recognizes the oral statements made, as well as the resulting written application.

The agent asked for the information furnished by Ralph Harris and subsequently wrote the answers in the application. (Appellee's Appendix 5b)

And the Statute could not contemplate that oral statements would be included in and made a part of the policy contract, as provided by 6179 (4) of the Tennessee Code.

We mention this because several times in the opinion reference is made to the fact that the written application was not attached to the policy.

Whether the application was attached to the policy or not evidence of the oral as well as the written misrepresentations is competent.

Lindsey v. *Manhattan Life Ins. Co.*, 24 Tenn. App. 17

Knowing he had the physical defect of "crossed nerves," and knowing he had the physical defect of "a fractured

skull," would not his denial of a physical defect be wilfully made and amount to fraud?

On page four of the opinion, it is said "the fundamental question to be determined is what was the real intention of the parties."

The uncontradicted proof answers *"no policy is issued without a written application"* (Appellee's Appendix 49b) and appellee "does not accept any one with physical impairment, defects." It was the intention of appellee to insure only persons without physical defects, or preferred risks. It was appellee's intention to rely on the oral representations and written application without an investigation report, when it was normal and regular on its face. (Appellee's Appendix 51b)

It was certainly not appellee's intention to insure one with a fractured skull, crossed nerves, or who had spells of any kind, and all of which Ralph Harris finally admitted he had.

It has been held that a transaction involving a contract of insurance is such as requires a full and frank disclosure of material facts, and that in such a case a concealment of them amounts to fraud.

Sewing Machine Co. v. *Jackson*, 83 Tenn., 418

A suppression of the truth or suggestion of falsehood is sufficient to set aside a contract.

White v. *Cox*, 4 Tenn., 79
Walker v. *Dunlap*, 6 Tenn., 271

"Where a party makes a representation he is bound to represent the truth as far as he knows it, and if he does not, equity will rescind the contract."

Fisher v. *Probart*, 6 Tenn., 75
Morgan v. *Elam*, 12 Tenn., 375

In its opinion, this Honorable Court cited cases relied on by appellee with the comment that the written application for insurance was a part of the policy.

Because the Statute is a part of the policy, as a matter of law, and because of the false representations made by Ralph Harris and of his concealment of material facts proven, we desire to repeat those citations, at this point, for the convenience of the Court.

> "A non-disclosure of any fact, which would vary the risk is regarded as fraud."
>
> *Catron* v. *Tenn. Ins. Co.*, 25 Tenn., 176
> *First National Bank* v. *Fidelity Co.*, 110 Tenn., 10

> "A false representation which increases the risk may avoid the policy even though made in good faith."
>
> *Columbian Life* v. *Harrison*, 12 Fed. (2d) 986
> *Robbins* v. *N. Y. Life*, 18 Tenn. App., 70

> "Representations do not have to be with intent to deceive, if it increases the risk."
>
> *Standard Life Ins. Co.* v. *Strong*, 19 Tenn. App., 404
> *Boyd* v. *Ins. Co.*, 90 Tenn., 212

> "A representation, as would naturally and reasonably influence the insurer, avoids the policy."
>
> *Commercial Standard Insurance Co.* v. *Paul*, 35 Tenn. App., 394
> *Little* v. *Washington Insurance Company*, 34 Tenn. Appeals, 593

B. On page three of the opinion, it is said "But Ralph Harris was never told by anyone that he had a scar on his brain, and did not know it."

We respectfully submit that there is no evidence in the record that he was not told of the scar, and *he does not*

deny that he knew it. He swore he had a skull fracture, (but not from injuries received in an automobile accident) and was taken to Dr. Semmes for it and that his "spells" thereafter occurred. X-rays were made which revealed the scar on the brain, as the Court correctly found. He was a grown man. Could it be even inferred that when he was advised that it would be two years until the final result of the fracture was known (Appellee's Appendix 119b) and then followed by "spells" which he says he knew he had, that he made no inquiry of the extent of the fracture and why the treatments until the year before he made the application for the insurance? Can it be concluded, as a fact, that he was not told of the injury to the brain, or of the cause of the spells by his physician?

And Ralph Harris swore that was why he did not go to college. (Appellee's Appendix 118b, 119b)

Why, if he did not know it, did it keep him from going to college? Indeed it would be unusual, and out of the ordinary, for his physician not to inform him, and certainly his physician was the person who told him it would be one or two years before the final result of the skull fracture could be determined?

C. The Court says, on page ten of its opinion, "The insured seems to have been sensitive on the point of his affliction with epilepsy, which he chose to call spells."

From that we conclude that this Honorable Court found that he knew he had epilepsy. Had he not known it, he could not have been sensitive about it.

There can be no question of the correctness of that finding, because Dr. Darnell's record, from which he testified, shows under date of January 3, 1946, the statement that Ralph Harris was then taking dilantin and phenobarbital for epilepsy. (Appellee's Appendix 34b) Certainly he made that record from Ralph Harris' statement to him.

From what other source could Dr. Darnell have obtained the information from which he made his record?

D. On page 2 of the opinion the Court said: "The insurance company contended that it (referring to epilepsy) was a physical defect."

Appellee does not contend that epilepsy is a physical defect. On the contrary appellee proved by Dr. Raskind (Appellee's Appendix, 90b) that he had a definite anatomical defect, a destruction of the brain tissue, (Appellee's Appendix 89b) which caused epilepsy. Also proved by Dr. Darnell (Appellee's Appendix 37b) that epilepsy is a symptom, and scar tissue on the brain a physical defect.

And appellant stated at page 17 of his brief "defendant's contention was that he had a scar on the brain and that this was a physical defect."

E. In its opinion on page 11, this Honorable Court says that Ralph Harris *innocently* stated that he had no physical defects.

The authorities are agreed that wilful and fraudulent intent and purpose can seldom be proven by positive direct evidence, but that proven circumstances and actions are usually necessary to establish it and that the concealment of the true facts is a strong circumstance showing a wilful and fraudulent intent.

Those proven circumstances which appellee believed established the wilful and fraudulent intent of Ralph Harris are not specifically set out in our brief and are not considered in the opinion. Appellee respectfully refers to them and requests their consideration.

He tried, at all times, to conceal the fact that he had spells. He knew if that were known that he could not have a driver's license. (Appellee's Appendix, 11b) He also knew that if the truth was known, he could not obtain automobile insurance in any company. (Appellee's Appendix, 51b)

When he applied for a driver's license, he not only stated "he had no physical or mental defects which would make it difficult to operate a motor vehicle safely" but also "that he had never suffered from epilepsy, fainting, or dizzy spells." (Appellee's Appendix, 100b) He denied to the adjuster, after the accident that he had ever had any kind of spells. (Appellee's Appendix, 120b)

He swore in the District Court that no one ever told him he had epilepsy, though *he admits that Dr. Raskind said something about epilepsy.* (Appellee's Appendix, 123b) He denied that Dr. Darnell prescribed for him. (Appellee's Appendix, 124b) He denied to Mr. Sam Nailling that he had ever been treated by Dr. Raskind and that he had epilepsy. And he not only denied it, but his father's attorney denied it until after the deposition of Dr. Raskind was taken a few days before trial in the State Court. (Appellee's Appendix, 73b) Thus it appears that appellant also attempted to conceal the true facts until the deposition of Dr. Raskind disclosed them. He told the adjuster he never heard of Ralph having drowsy spells before. (Appellee's Appendix, 103b)

And after the deposition of Dr. Raskind was taken, appellant testified in State Court that his son had had epilepsy since 1940, and told him he always knew in advance when a spell was coming on. (Appellee's Appendix, 111b)

Appellant had denied his son having epilepsy or his attorney would not have denied it to Mr. Nailling.

The facts evidence a wilful and deliberate intent and purpose to conceal his epilepsy.

Ralph Harris also swore that he had not had an attack since 1949, and had not been treated for it since. (Appellee's Appendix, 118b) Dr. Raskind swore he had treated him for attacks since then, and testified Ralph "returned in less than 30 days becase of subsequent seizures." (Appellee's Appendix, 92b)

"It is a rule of law that if a witness swears knowingly false about any material fact in issue, he is wholly discredited and should not be believed on any fact."

Zackary v. *State*, 66 Tenn. 1
Davis v. *Mitchell*, 27 Tenn. App., 182, 178 S. W. (2d), 889

Ralph Harris swore he knew he had "crossed nerves." He swore he knew he had "a fractured skull." Either and both are physical defects. It was his duty under the law to tell the truth in negotiating for insurance. He is not permitted to conceal any material fact, and if he does, it is fraud.

Sewing Machine Co. v. *Jackson*, 83 Tenn., 418

He made the oral statement that he had no physical defect and then made the written application to the same effect, which was untrue and he knew it. It matters not whether the physical defect was scar tissue or a fractured skull, or crossed nerves which expression Dr. Darnell says could be used. (Appellee's Appendix 36b) We cannot escape the conclusion that it was his purpose and intent to conceal those defects, just as he had done about his spells, and by untruths, if necessary.

COOPERATION

Appellee respectfully requests a reconsideration of the facts applicable to this phase of the case and of certain decisions of the Courts not discussed in the opinion.

In our brief, we omitted to direct attention to the fact that Ralph Harris told Mr. Sam Nailling he retired at 10 o'clock the night before; that he had all of his faculties and was perfectly normal before the accident and that he

had no warning whatever. If he had he would have stopped. (Appellee's Appendix, 56b)

That statement was a perfect defense and would not have even made a jury question in the State Court.

Mr. Nailling put him on the witness stand. On direct examination, he swore he went to bed the night before at 10 o'clock. (Appellee's Appendix 116b) On cross examination he helped his father and swore he went to bed at one o'clock. (Appellee's Appendix 119b) and had lost considerable sleep; that *immediately before the accident he felt drowsy and sleepy.* (Appellee's Appendix, 120b) and that when ever he had had spells he could tell far enough in advance to stop driving. And this notwithstanding he had denied having spells of any kind to Mr. Sam Nailling until the day of trial. (Appellee's Appendix 59b, 77b) And Ralph Harris also injected into his testimony, "I felt so bad that morning." (Appellee's Appendix 63b) He also swore that he had not been treated for spells since 1949, and that he had had none since, (Appellee's Appendix, 67b) when, as a matter of fact, he had had three attacks and was treated for them. (Appellee's Appendix 73b, 75b)

The only reason that can be offered for such false testimony in the State Court was to make it appear that he had recovered from his epilepsy prior to the date of his negotiations and application for the policy of insurance and to negative the fact that he had an epileptic attack at the time of the accident.

Being a party to the lawsuit, he, as the defendant, was bound by his testimony and the jury and trial Judge thus held.

He also contradicted Dr. Raskind, when on the witness stand, whose testimony the Court does not doubt. But being the party defendant, the defense was bound by his untrue testimony.

Had Mr. Nailling, the defense attorney, known that he would thus change his testimony and swear falsely, he, or no other trial lawyer, would have put him on the witness stand to be bound by such false testimony.

The conclusion cannot be escaped that he did that to assist his father's side of the lawsuit.

We respectfully submit that was highly prejudicial and prevented a trial on the true facts which it was his duty to disclose.

Mr. Nailling never got a full, fair and complete statement of the accident from Ralph Harris. (Appellee's Appendix 75b) He gave Mr. Nailling two or three versions of how the accident happened, and a "child could tell he was not telling the truth." (Appellee's Appendix 79b)

We did not point out these facts in appellee's original brief and which are uncontradicted.

The failure of Ralph Harris to swear the truth is sufficient evidence of lack of cooperation.

Wheeler v. *Lumberman's Mut. Cas. Co.*, 5 Fed. Supp., 193

"A deliberate and wilful falsification of material facts violate the terms of these insurance contracts."

U. S. F. and G. Co. v. *Wyer*, 60 Fed. (2d) 856

In accord: *Bertinelli* v. *Salani*, 118 A. L. R. 398

Buckner v. *Buckner*, Annotated in 98 A. L. R. page 1470

Finkle v. *Western Auto Ins. Co.*, 26 S. W. (2d) 843

In view of the importance of these facts not specifically pointed out in our brief, appellee requests that this question be reconsidered, and that it be held that there was a lack of cooperation contemplated in the policy and that

the rule announced in *Ocean Accident and G. Corp.* v. *Lucas*, 72 Fed. (2d) 115 be applied, wherein it is said:

"Cooperation means that there shall be a fair, full and accurate disclosure of facts by the assured." Deliberate and wilful falsification of material facts by the assured "constitutes a violation of the terms of a policy of automobile liability insurance."

In accord: *General Casualty Co.* v. *Kiestead*, 67 Fed. (2d) 523

CONCLUSION

This Honorable Court found and held that the untrue representations were material to the risk and increased the risk assumed and would defeat a recovery in this case if the application had been made a part of the "Declarations," and said "To avail itself of insured's statement that he had no physical defect, the insurance company would either have to show that it was made with intention to defraud, or that such representation was made a part of the policy." (Opinion page 11)

Proof of the oral representations, and of the written application is competent, whether it is attached to the policy or not.

Lindsey v. *Metropolitan Life Ins. Co.*, 10 Tenn. App., 293 93 A. L. R., 392, 393

According to opinions of our Courts, not cited in our original brief, and not considered by the Court, the oral misrepresentation and written misrepresentation in the application are the two misrepresentations mentioned in Tennessee Code Section 6126.

The Supreme Court has held that Section 6126 is, as a matter of law, incorporated into and made a part of every

insurance contract, and as much a part of it as if copied in the face of the policy.

Hartford Life Ins. Co. v. *Stallings*, 110 Tenn., 1

That being true, and the risk of loss having been found to have been increased, we respectfully submit and request that a reconsideration and a re-hearing be granted, and appellant's suit dismissed.

Respectfully submitted,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant-Appellee,
SAM C. NAILLING,
Union City, Tennessee,
ROBT. P. ADAMS,
Trenton, Tennessee,
Attorneys for Appellee.

CERTIFICATE

STATE OF TENNESSEE)
GIBSON COUNTY)

Robt. P. Adams, one of the attorneys for appellee in this case, made oath and certified that the petition for a re-hearing in this cause is true to the best of his knowledge, information and belief; that it is filed in good faith and is not filed for delay.

(Signed) ROBT. P. ADAMS.

Subscribed and sworn to
before me March 10, 1956

(Signed) JEANNETTE SWAIM, Notary Public
My comm. expires July 9, 1957
(SEAL)

ORDER DENYING REHEARING
(Filed April 10, 1956)

The above cause came on to be heard upon appellee's petition for rehearing and answer and reply thereto of appellant. The petition and answer are comprehensive and substantiated by numerous authorities. Upon due consideration of the arguments, the court is of the opinion that the petition for rehearing should be denied.

However, one of the arguments of appellee should be here noted. In the opinion of the court, it was stated that there was no evidence that any physician had told Ralph Harris that he had "crossed nerves." It appears that Harris testified that Dr. Darnell had told him that he had "crossed nerves"; but when that physician was called up as a witness, he testified that he could not recall ever having heard of such a term used and that he did not treat Harris for such a condition. Thereafter, Harris stated that a different physician, who was not present in court, had made this statement to him. However, appellee contends that, in any event, the testimony of Harris in this regard was untrue. There is no evidence that there is any physical defect known as "crossed nerves"; and the insurance company defended the case, not on the ground that Harris suffered from such a defect, but rather because he was subject to epilepsy, which the evidence disclosed was not a physical defect but a disease. In fact, in its petition for rehearing, appellee states that it does not contend that epilepsy is a physical defect. While the statement that there was no evidence that any physician had told Harris that he had "crossed nerves" is inaccurate, as above outlined, it was not a variance that had any bearing upon the ultimate decision of the court.

The petition for rehearing is denied.

ORDER RECALLING AND STAYING MANDATE

(Filed May 17, 1956 – Carl W. Reuss, Clerk)

Before SIMONS, Chief Judge; ALLEN and MCALLISTER, Circuit Judges.

The above cause coming on to be heard on a motion by appellee to recall and stay the mandate, and the court being duly advised.

Now, therefore, it is hereby ordered that the motion to recall the mandate heretofore issued and to stay the mandate herein, pending application to the Supreme Court for writ of certiorari, is hereby granted; and the issuance of the mandate is stayed for *twenty (20) days* from this date; provided that if, within such twenty (20) days the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such twenty (20) days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of a copy of an order denying the writ applied for, the mandate shall issue.

Approved for entry.

/s/ Thomas F. McAllister
United States Circuit Judge

STATUTES INVOLVED

Williams Code of Tennessee Section 6086:

> "What policies to contain whole contract; construed as Tennessee contracts. – Every policy of insurance issued to or for the benefit of any citizen or resident of this state on or after the first day of July, 1907, by any

insurance company or association doing business in this state, except fraternal beneficiary associations and mutual insurance companies or associations operating on the assessment plan, or policies of industrial insurance, shall contain the entire contract of insurance between the parties to said contract, and every such contract so issued shall be held as made in this state and construed solely according to the laws of this state."

Williams Code of Tennessee Section 6179 (4):

"Section 6179. "No policy of life insurance shall be issued in this State or be issued by a life insurance company organized under the laws of this state unless the same shall contain the following provisions: (4) a provision, except in industrial policies, that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and that no such statement shall avoid the policy unless it is contained in a written application, and a copy of such application shall be indorsed upon or attached to the policy when issued."

Williams Code of Tennessee Section 6126:

"Misrepresentation or warranty will not avoid policy, when. No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

Rule 52 (a) Civil Procedure — pertinent portion:

"Finding of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witness."

JUN 13 1956
HAROLD B. WILLEY, C

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. (993) 129.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

vs.

OMER M. HARRIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. (993) 129.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Petitioner,

vs.

OMER M. HARRIS,
Respondent.

BRIEF IN OPPOSITION TO WRIT.

Respondent respectfully submits to the Court that none of the reasons, indicated in Rule 19 of this Court, exists for the granting of the writ of certiorari sought in this action.[1] Since respondent is dissatisfied with the Statement of the Case set forth in the Petition filed herein, we feel compelled to incorporate herein an accurate and concise statement of the case, containing the facts material to the consideration of the question presented.

[1]In our judgment, petitioner has subjected itself to dismissal of its petition under Rule 23, subsection 4.

I.

STATEMENT OF THE CASE.

1. Pleadings, Judgment, Appeal, etc.

The respondent, Omer M. Harris, while riding as a passenger in an automobile owned by his son, Ralph Harris, was injured when the car went out of control and ran into an embankment. He brought a negligence action against his son in the Circuit Court of Obion County, Tennessee, and recovered a judgment for personal injuries in the amount of $15,000.00. The son, Ralph Harris, was insured by petitioner against liability to the extent of $10,000.00.

An appeal was taken from this judgment by the son, Ralph Harris, to the Court of Appeals of Tennessee where the judgment was affirmed. A review was not sought in the Supreme Court of Tennessee by the petitioner, or its insured, although such a review was available under the laws of Tennessee. Tennessee Code, Annotated, Official Edition, Title 27, section 819. The judgment thus became final.

Demand was made upon petitioner for payment and satisfaction of the judgment to the extent of $10,000.00 in accordance with the terms of its contract of insurance. The petitioner declined and refused to pay whereupon this action was brought.

Respondent commenced this action in the Circuit Court of Obion County, Tennessee. On the ground of diversity of citizenship, petitioner removed the case to the United States District Court for the Western District of Tennessee, Eastern Division, where it was tried to the court without a jury.

The Court filed findings of fact, conclusions of law and entered judgment of dismissal. From the judgment of dismissal, respondent, Omer M. Harris, appealed to the United States Circuit Court of Appeals, Sixth Circuit.

On February 29, 1956, the United States Court of Appeals, Sixth Circuit, rendered its opinion and judgment, reversing the District Court and directing entry of judgment in favor of respondent.

2. Issues in the Court of Appeals.

The questions presented and raised by the respondent (appellant in the Court of Appeals) emerged from the issues created by the pleadings and the errors committed upon the trial of the case.

The petitioner had defended on the grounds that the insured (a) had procured the insurance by mispresentation and fraud and (b) had breached the conditions of the policy of insurance with respect to cooperation in the defense of the action in the Circuit Court of Obion County, Tennessee.

Upon the trial of the case, the District Judge, over the objection of respondent, permitted Sam C. Nailling, attorney for the petitioner and the only attorney who had represented the insured, Ralph Harris, in the negligence action in the Circuit Court of Obion County, Tennessee, to testify to transactions, conversations, and dealings with the said Ralph Harris, during the pendency of, and before and after, the trial in the negligence action.[2]

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[2]Such testimony was in direct violation of the law of Tennessee, which provides: "No attorney, solicitor or counsel shall be permitted, in giving testimony against a client, or person who consulted him professionally, to disclose any communication made to him by such person, during the pendency of the suit, before or afterwards, to his injury." Tennessee Code, Annotated, Title 29,

Furthermore, over the objection of respondent, the District Court admitted in evidence, as a part of the petitioner's evidence in chief, the depositions of Dr. Robert Raskind and Dr. Leigh K. Haynes, both of whom lived within 100 miles of the place of trial, and in the absence of any evidence which would bring them within any of the exceptions enumerated in Rule 26(d)(3) of the Federal Rules of Civil Procedure.[3]

Respondent asserted in the Court of Appeals, Sixth Circuit, the following propositions to be true and grounds for reversal:

1. The insured, Ralph Harris, did not obtain the policy of insurance sued upon in the action by either fraud or misrepresentation;

2. The insured, Ralph Harris, cooperated with the petitioner in the defense of the negligence action in the Circuit Court of Obion County, Tennessee;

3. The testimony of Sam C. Nailling was illegally and improperly received in evidence and highly prejudicial to the insured, Ralph Harris, whom he represented in the Circuit Court of Obion County, Tennessee; and

4. The depositions of Dr. Leigh K. Haynes and Dr. Robert Raskind were inadmissible under the plain terms of the Federal Rules of Civil Procedure.[4]

Section 305. Penalties are attached to such conduct. Title 29, Section 307. The testimony of Mr. Nailling was vital to petitioner's case in the district court and highly prejudicial to Ralph Harris since, in the event the petitioner is successful, he will be onerated with the payment of $10,000.00 more than otherwise.

[3]This was in direct contravention of Rule 43 (a) of the Federal Rules of Civil Procedure which provides that, "In all trials the testimony of witnesses shall be taken *orally* in open court, unless otherwise provided by these rules."

[4]The questions were not, of course, stated in this form in the court of appeals, but in the form of questions and answers, as required by the rule of the Court of Appeals.

The Court of Appeals agreed with respondent upon the first two propositions, above stated, and reversed the case with directions to the District Court to enter judgment for the respondent. It pretermitted a decision upon the third and fourth questions, a decision upon either of which would have been probably equally fatal to petitioner's case. It was, of course, unnecessary to decide these questions in view of the opinion and judgment of the court reversing the case and directing judgment for respondent.

3. Summary of Evidence.

The petitioner had, annually, issued a policy, or renewal, to Ralph Harris, commencing about 8 years prior to the accident in which respondent was injured. The application for the policy, here involved, was dated March 16, 1950, and was upon a *printed form* of the petitioner (R. 98b, 99b). It was designed to elicit information as to the name of the applicant, his address, purposes for which automobile was to be used, employer's name, make of automobile, year model, motor number, cost, date purchased, estimated mileage, incumbrances, etc. There was no schedule of questions relating to the health of the applicant, whether he had any disabilities, diseases or bodily ailments. There was a column headed "Physical Defects" and in answer to this question, the insured, Ralph Harris, answered "None."

The application was *not attached* to the policy and was not a part of it. The petitioner is a mutual company, however, and could have made the application a part of the contract, if it had desired to do so, without physical attachment. By its express terms, the contract accomplished the opposite result, as the Court of Appeals had carefully shown, thus affording to its policyholders the full protec-

tion accorded to them by the terms of the policy *as written and delivered to them.*

The policy of insurance which was issued to Ralph Harris, and upon which this action was brought, contains a provision which expressly provides:

> "21. Declarations. By the acceptance of this policy the named insured agrees that the statements in the *declarations* are his agreements and representations, that *this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company* or any of its agents relating to this insurance."

The above provision, which appears in the policy under the heading "Conditions," refers to the heading "*Declarations*," on the *first page* of the policy and is to be *distinguished* from the *application* which constitutes no part of the policy and is *not referred* to therein.

The insured, Ralph Harris, about ten years before he applied for the policy of insurance, received a head injury that resulted in the formation of a scar on his brain tissue. He always referred to it as "crossed nerves." The existence of the scar was determined from an X-ray film made by a neurosurgeon but Ralph Harris was never informed by anyone that he had such a scar. His last "spell" or seizure, prior to the accident in question, occurred in 1949.

In the negligence suit, tried in the Circuit Court of Obion County, Tennessee, the issue practically narrowed itself to the single question of whether the insured went to sleep at the wheel of the automobile or suffered an epileptic attack. It was such a point of material controversy that the trial judge in that case instructed the jury that if they should find that the insured suffered an attack of

epilepsy, causing the injuries to respondent, he, Ralph Harris, would not be liable (R. 56a).

The insured, Ralph Harris, testified on behalf of the petitioner. He had given a full and complete statement to an adjuster, or investigator, for petitioner in which he stated that "I must have dropped off to sleep * * *." This statement was made on December 12, 1952, and prior to the trial of the negligence action (R. 25b). He had made a similar statement to his physician, Dr. Leigh K. Haynes (R. 85b).

On the trial of the case in the Circuit Court of Obion County, Tennessee, he testified in a manner parallel to the statement given by him to the investigator. The Court of Appeals, in the instant case, has carefully related the evidence given by the insured on this issue (R. 21a and 22a).[5] The Court of Appeals concluded that, "it cannot be said that the insured failed to cooperate by testifying that he was drowsy and had fallen asleep instead of testifying that he lost consciousness suddenly."[6]

After being sued by his father (respondent herein), Ralph Harris continued to cooperate with petitioner and with the attorney for petitioner. He responded regularly to every call or summons to the office of Mr. Nailling, counsel for the petitioner (R. 41a). He signed and properly executed an appeal bond incident to an appeal in the Ten-

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[5]Our reference here is to the appendix to the petition for the writ. Previously our references have been to the appendices to the briefs filed in the Court of Appeals. We are puzzled at the pagination in the appendix to the petition. The letter "a" is used throughout.

[6]The Judge in the Circuit Court of Obion County, remarked during the proceedings, with respect to an alleged conflict between the testimony of Ralph Harris and the statements given to the adjuster, "There is no conflict." (R. 60a).

nessee courts (R. 41a). He was present at the trial (R. 41a). Petitioner's attorney had available all of the statements given by the insured. Even the respondent testified in the case that Ralph Harris was an epileptic. Petitioner and its counsel knew that Ralph Harris was an epileptic and had medical proof of it before the trial in the Circuit Court of Obion County (R. 74b).

There was no clause in the contract of insurance excluding risks incident to the transportation of relatives or members of the insured's family, or accidents resulting from the physical condition of the insured or of those persons using the automobile with the permission of the insured.

The undisputed evidence in the case was that epilepsy was not a "physical defect." See testimony of Dr. R. M. Darnell (R. 35a). The Court of Appeals so found (R. 15a) (as designated in appendix to petition). And the petitioner *conceded*, in its petition to rehear, filed in the Court of Appeals, that epilepsy is *not* a physical defect. R. 36a in appendix to petition for writ.

II.

REASONS FOR DENYING THE WRIT.

1.

There is no conflict between the decision of the Court of Appeals, Sixth Circuit, in this case and any applicable decision of the Supreme Court of the United States.

In its petition for the writ of certiorari, the petitioner has cited three cases decided by this court, to-wit:

Equitable Life Assurance Society v. *Pettus, Admr. of Clements*, 140 U. S. 226.

Gunning v. *Cooley*, 281 U. S. 90.

United States v. *Yellow Cab Co.*, 333 U. S. 338.

The petitioner has completely *misconceived* the ruling of the Court of Appeals in the case at bar; otherwise, it would not have cited or relied upon any of these cases.

In the case of *Equitable Life Assurance Society, supra,* the court, in effect, held that a statute of Missouri, pertaining to life insurance, applied as if copied on the face of the policy. The Court of Appeals, Sixth Circuit, has not decided the case at bar in a manner in conflict with the decision in the *Equitable* case. It quoted literally the Tennessee statute and demonstrated its *inapplicability* (R. 16a, 17a and 18a) (appendix to petition for writ). The Tennessee statute, if incorporated in the policy, would not have resulted in any benefit to petitioner. As the Court of Appeals declared:

> "But the insurance company, in this case, in its contract of insurance, foreclosed itself from relying on the statements in the application by its stipulation that the policy itself embodied all the agreements between the company and the insured."

Had Section 6126 of Williams Code of Tennessee (now Title 56, Section 1103, Tennessee Code Annotated, Official Edition) been copied *verbatim* into the policy, it would not and could not have altered the results in this case.

There is but *one representation* claimed by petitioner to have been either false or fraudulent. It was in the application. The petitioner, as stated, has barred itself from relying upon representations made in the application. Only representations contained in the *Declaration*, appearing on *page one of the policy*, have materiality. And they have not been questioned in this litigation.

In *Gunning* v. *Cooley, supra,* the rule with respect to the credibility of witnesses and weight to be given to their

testimony is declared to be vested in the triers of the facts, but the point is not involved in the case at bar.

In *United States* v. *Yellow Cab Co.*, 333 U. S. 338, there was involved nothing more than an interpretation of Rule 52 of the Federal Rules of Civil Procedure with respect to the finding of fact by a district court. There is no semblance of conflict between the decision of the Court of Appeals and decision in the *Yellow Cab* case. In the case at bar, the District Court's findings of fact and conclusions of law were *clearly erroneous* on the *undisputed facts* in the case. Its finding that the application constituted a part of the policy was contradictel by the plain language of the policy. The contract of insurance provided *exactly the opposite* of what the District Court found and it did so in very precise language.

The petitioner has failed to cite a single case, decided by this Court, dealing with the question relating to an alleged breach of the cooperation clause of a liability insurance contract, or with the question relating to the procurement of such a policy by fraud or false representations, which are the questions involved in this case.

2.

There is no conflict between the decision of the Court of Appeals, Sixth Circuit, in this case, and the decisions of any other circuit court of appeals, on the same matter, or any conflict with its own prior decisions.

Petitioner is insisting as grounds for the granting of the writ of certiorari that there is a "conflict" between the decision of the Court of Appeals, Sixth Circuit, and the decisions of other circuits, including a prior decision of the Sixth Circuit. The following cases are cited:

U. S. F. & G. v. *Wyer*, 10 Cir., 60 F. 2d 856.

General Casualty Co. v. *Kierstead*, 8 Cir., 67 F. 2d 523.

State Auto Ins. Co. v. *York*, 4 Cir., 104 F. 2d 730.

Ocean Accident and Guarantee Corp. v. *Lucas*, 6 Cir., 74 F. 2d 115.

In relying upon these cases petitioner and its counsel must surely have *overlooked the language of Rule 19* of the Supreme Court of the United States. It provides:

> "* * * The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) * * *.
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals *on the same matter;* * * *." (Italics ours).

It is well settled that the writ of certiorari will not issue to determine whether the evidence in the case is sufficient to establish the issues.

In the case of *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, Mr. Justice McReynolds, speaking for the Court, observed:

> "The argument developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use—primarily a question of fact. That is not the ground upon which we granted the petition, and, if sufficiently developed, would not have moved us thereto."
>
> "Heretofore we have pointed out the necessity for clear, definite, and complete disclosure concerning the controversy when applying for certiorari." (Citing cases). * * * "Obviously it is impossible for us critically to examine so many records before ruling upon ap-

plications, and we must rely very largely upon preliminary papers. Unless the requirements specified in *Furness, W. & R. Co.* v. *Yang Tsze Ins. Asso.* are observed, we cannot hope to dispose of an increasing docket."

The decision of the Court of Appeals for the Sixth Circuit, in this case, is not in conflict with any decision of another court of appeals *on the same matter.* It has not decided the case in a manner inconsistent with any of its former opinions. Were it not for the provisions of Rule 23, (2) of this Court, the respondent would enter a motion to dismiss the petition filed in this case for failure to present any of the reasons enumerated in Rule 19 for the granting of the writ.

In *Layne & Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, Chief Justice Taft declared, with respect to the granting of the writ, that it would only be done in those cases "where there is a real and embarrassing conflict of opinion and authority by the circuit courts of appeal. The present case certainly comes under neither head." At the same Term of this Court, in *Magnum Import Co.* v. *Coty*, 262 U. S. 59, the Chief Justice again and elaborating, observed:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari in the circuit court of appeals was given for two purposes: first, to secure uniformity of decisions between those courts in nine circuits, and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. *The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.* Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Italics ours).

In the cases cited by the petitioner from the Eighth and Tenth Circuits—*U. S. F. & G. Co.* v. *Wyer, supra*, and *General Casualty Co.* v. *Kierstead, supra*, the decisions were based upon the facts peculiar to each of the cases and wholly distinguishable from those present in the case at bar.

Thus, in the case of *U. S. F. & G. Co.* v. *Wyer, supra*, the court's recital in its opinion, relating to the issue of non-cooperation, included:

> "The answer of the company alleged that its defense of the former suit was with a reservation of its rights under the policy that although Buffalo and his chauffeur, A. V. Jolly, drove the car and their negligence proximately caused Wyer's injury and wilfully represented to the company that the car was not driven by them at the time of the accident but by some person unknown, Buffalo obtained $500.00 from the company on the representation that the car had been stolen when the accident occurred, the misrepresentations were relied upon by the company, he did not cooperate with the company in securing its rights, which was a condition of liability, and Wyer's rights to recover against the company were no greater than those of Buffalo, had he paid the judgment of Wyer."

Such facts are widely different from those alleged to have existed in the case at bar and present a totally variant picture. Manifestly, this decision is not in "conflict" with the decision in the present case.

Likewise, in the case of *General Casualty Co.* v. *Kierstead, supra*, the facts preclude any comparison with the case at bar. The Court of Appeals, Eighth Circuit, outlined the factual situation, in part, as follows:

> "The appellant defended the negligence suit on the ground that there was a breach of a condition vitiating the policy, in that the insured failed, neglected

and refused to cooperate with the insurance company in the defense of the action brought against Kierstead, it being alleged that he refused to furnish information concerning witnesses and the details of the accident; that he refused to answer correspondence and wires sent to him; that he purposely refused to advise defendant of his whereabouts; and that he refused wilfully and purposely to attend the trial, although requested to do so."

Clearly, this case did not turn upon the same character of evidence as is presented in the case at bar. The respondent was guilty of none of the acts mentioned in the *Kierstead* case, nor was he guilty of any act of non-cooperation, and the record in this case demonstrates that he was not guilty of any of them.

In the Fourth Circuit case, cited by petitioner—*State Automobile Insurance Company* v. *York*, *supra*, where the facts indicating want of cooperation, and proved, were much stronger than those alleged in the case at bar, the court rejected the contention of non-cooperation and upheld a judgment for the judgment creditor. It is significant that, in this case, Judge Parker pointed out, with respect to family relationship, the proper view to be taken of such a situation, in forceful language:

"A confusing element is introduced into the case by reason of the fact that the husband's interest is almost necessarily enlisted on the side of his wife in a suit against him in which any recovery will benefit her and will be paid by an insurance company and not by him; but the company has ample means to protect itself from the danger of a situation of this sort by excluding from the coverage of its policy liability to the wife or other members of the insured's family. Where for just reasons it elects to cover a risk of this character, it cannot complain when liability is asserted, nor should it be permitted to shield itself by

> the argument that the ordinary friendly relationship existing between members of a family furnishes of itself evidence of fraud and collusion. In such a case where members of a family corruptly conspire and work together to secure a recovery not justified by the facts, the policy should be and is avoided; but it is not avoided merely because the sympathy of insured is with the injured members of his family rather than with the company which insured him, or because he does not suspend during the litigation ordinary friendly intercourse with his family. The inquiry is not whether the sympathy of insured is with the plaintiff in the litigation, but whether he has failed to furnish proper assistance to the company in its defense of the suit or has entered into collusion with plaintiff to establish liability unfairly."

While this extract from the opinion in the *York* case may not be applicable to the topic presently considered, it is material in view of petitioner's contentions with respect to the merits of the case. The *York* case affords no basis whatever for the view that there is a conflict between the decision by the Sixth Circuit and its decision.

None of the cases cited by petitioner involve a conflict between the circuit courts of appeal in the application of any rule of law. There are a large number of decisions by the appellate courts, both state and federal, in some of which, upon a consideration of the facts unique to each of the cases, the courts have held that a breach of the cooperation clause has occurred; in others, that no breach had occurred. Such a divergence of results offers no basis, under Rule 19, for granting the writ.[7]

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[7]It should be noted that in the *York case, supra,* the Circuit Court of Appeals held that no breach had occurred; whereas, in the *Wyer case, supra,* another Circuit Court had held that a breach of cooperation clause had occurred. The Supreme Court of the United States denied certiorari in both cases. Patently, there was no such conflict between the decisions as was contemplated by Rule 19. Each case presented its own unique and distinguishable factual situation.

Stated succinctly, as respondent understands Rule 19, there must be a conflict between the courts of appeals as to a specific principle or rule of law in a given situation. Otherwise, the Rule could not accomplish its purpose.

The case of *Ocean Accident and Guarantee Corp.* v. *Lucas*, 6 Cir., 74 F. 2d 115, cited by petitioner, positively held that there had been no breach of the cooperation clause and does not support the petitioner in any manner whatever.

Mr. Justice Frankfurter, in *Carter* v. *Atlanta & St. A. B. R. Co.*, 338 U. S. 430, 438-439, has expressed our views in a manner more forcefully and brilliantly than we can utter:

> "Where a case involves no general principle requiring pronouncement but merely its own unique circumstances, such alleviation is inconsistent with the criteria, set forth in Rule 38 (now Rule 19), governing this court's discretion in granting a writ of certiorari.
>
> "The argument at the bar of this court and the opinions dealing with the merits leave no room for doubt that no general principle is here involved. *There is merely a difference in the appreciation of professedly settled rules to the circumstances of this particular case.*" (Italics and matter in parentheses is ours).

And Mr. Justice Frankfurter has pointed out that the granting of such petitions may engender a feeling of discrimination in taking some cases that ought not to be taken and in rejecting others. *McAllister* v. *United States*, 348 U. S. 19. To the same effect, *N. L. R. B.* v. *Pittsburgh*, 340 U. S. 498 and *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70 (Iowa, 1955).

Counsel for respondent has examined each of the citations appearing in the petition and is unable to find any conflict whatever between any of them and the decision of the Sixth Circuit in this case.

3.

There is no conflict between the decision of the Court of Appeals, Sixth Circuit, in this case, and the applicable State law.

In the petition for the writ of certiorari, there appears, under the heading "Questions Presented," the following assertion:

> "Whether the Circuit Court of Appeals was in error in refusing to follow the opinion of this Court, and that of the Supreme Court of Tennessee, without commenting on either of them. The opinion of the Circuit Court of Appeals conflicts with both and, in effect, holds that State Statutes are not a part of an insurance contract."

The foregoing "Question" (*sic*) was a wholly unwarranted criticism of the opinion of the Court of Appeals. The Court of Appeals dealt at length with the applicable Tennessee Statute and the decisions of the Tennessee Courts. The two statutes, involved in a determination of this case according to petitioner, are Sections 6086 and 6126 of Williams Tennessee Code, Page 3 of Petition. Both of these statutes were incorporated *literally* in the opinion of the Court of Appeals and appears on pages 16a and 19a in the appendix to the petition.

Section 6086 of Williams Code of Tennessee has no application in the present suit because, as the Court of Appeals clearly stated, the petitioner is a *mutual* insurance company and excluded, in terms, by the statute. This

portion of the opinion was favorable to petitioner because, if it had not been a mutual company, the application or a copy thereof would have had to have been physically attached to the policy at the time it was issued. *Arnold* v. *New York Life Insurance Company*, 131 Tenn. 720. The Court of Appeals thereupon specifically pointed out that the *provisions of the contract* (and not the statute), in the instant case, foreclosed the right of petitioner to rely upon the application.

The remaining statute, referred to by petitioner, is Section 6126 of Williams Code of Tennessee, and it reads as follows:

> "No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed material or defeat the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

Petitioner asserts that this statute is incorporated in every contract of insurance issued in Tennessee. Such is the law but it affords the petitioner *no basis* for the conclusions which it draws.

The statute is negative *in form and purpose*, and was designed to preclude the insurer (not the insured) from relying upon technical defenses for the purpose of defeating and voiding insurance policies. *Hartford Life Insurance Company* v. *Stallings*, 110 Tenn. 1. The statute was enacted solely for the benefit of the insured. It does not enlarge, but restricts, the defenses available to the insurer. It was designed to preclude and foreclose the insurer from relying on any type of representations or warranties,

whether written or oral, except those made with an actual intention to deceive or unless the misrepresentation increased the risk. The exceptions enumerated did not create any new or different right of defense not theretofore available to the insurer, but merely preserved them.

The quoted statute does not purport to restrict or deprive the insurer of the right to issue a policy without an application therefor or to prohibit it from waiving any benefit. The petitioner plainly had the lawful right to insure any person against judgments which might be rendered against them through the negligent operation of an automobile, without regard to the physical "defects" or health of the applicant. The statute does not preclude the insurer from contracting away its right to rely upon representation made in the application. As the Supreme Court of Tennessee has declared in the *Hartford case, supra,*

> "This statute is in phraseology very similar to legislation enacted within the last few years in many of the States which was intended to 'relieve against the hardships arising from the enforcement of the commonlaw as to warranties in insurance policies, which was often invoked by companies which had issued them to defeat recoveries, when the matters covered by these warranties has no real or proximate relation to the risk assured. By the aid of such warranties and the innocent mistakes of the insureds, it often happened that the insurer was able to escape liability on a ground having no legal merit and of the purest technicality.'" *Penn. Mut. Life Ins. Co.* v. *Mechanics Savings Bank & Trust Co.*, 19 C. C. A. 316, 73 Fed. 653, 38 L. R. A. 33.

In the case of *Stubblefield* v. *Mutual Benefit Assn.*, 11 Tenn. App. 411, the Court of Appeals of Tennessee had under consideration a health and accident policy. By the expressed terms of the policy it was provided:

"The policy provided for strict compliance on the part of the insured and beneficiary with all the provisions and agreements of the policy and the application, as a condition precedent to recovery, and for forfeiture of all right to indemnity for any failure in this respect."

Earlier in the opinion of the Court in the *Stubblefield* case, the court had set forth in full some of the provisions contained in the application, the most relevant of which reads as follows:

"'18. Do you hereby apply to the Mutual Benefit Health and Accident Association for a policy to be based upon the foregoing statements of facts, and do you understand and agree that the falsity of any statement in this application shall bar the right of recovery if such statement is made with the intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the Association, and, do you agree to notify the Association promptly of any change in your occupation, or if you take additional insurance? Yes."

The case of *Insurance Company* v. *Lauderdale*, 94 Tenn. 635, cited by petitioner, involved a policy which, by its plain terms, made the application a part of the contract—a situation exactly opposite to that in the case at bar. The case *was considered* by the Court of Appeals.

Likewise, in the case of *Norvell* v. *Mutual Benefit Association*, 14 Tenn. App. 396, the application was copied into the policy.

Commercial Insurance Co. v. *Paul*, 35 Tenn. App. 394, cited by petitioner, is clearly not in point. There was an error in the name of the person intended to be insured and it appeared upon the face of the policy. The court *reformed* the policy. Its reference to Code Section 6126 was

for a purpose entirely foreign to any of the issues in the case at bar, as will be readily perceived from a mere reading of the opinion in the case.

Boyd v. *Insurance Co.*, 90 Tenn. 212, cited by petitioner, involved a fraudulent representation appearing in the policy itself. Moreover, it was decided before the enactment of Section 6126 of Williams Code.

Columbian Life v. *Harrison*, 6 Cir., 12 F. 2d 986, cited by petitioner, was carefully considered by the Sixth Circuit in its opinion in the case at bar and was, by it, distinguished because the application, in the *Harrison* case was, by the express terms of the policy, incorporated in it (R. 17a) (in appendix to petition).

The case of *Little* v. *Washington Ins. Co.*, 34 Tenn. App. 593, involved a suit upon a family group hospital insurance policy. There is nothing in this opinion to indicate that the application was not a part of the policy. On the contrary, the opinion is predicated upon the assumption that the application was a part of the policy. The policy was issued without a medical examination and the application contained an extensive catalogue, or list, of questions designed to elicit rather complete information as to the physical condition of the members of the family. The case is not, in any sense, authority for the claim made by the petitioner herein. Likewise the case of *First National Bank* v. *Fidelity Co.*, 110 Tenn. 10, is not authority for any of the contentions of the petitioner.

The case of *Standard Life Insurance Co.* v. *Strong*, 19 Tenn. App. 404, is one wherein the court specifically recites that, "The policy in question was, according to its terms, issued by complainant in consideration of an application therefor (a copy of which application was attached to and made a part of the policy), * * *." It was an action by

the Standard Life Insurance Co. to cancel a policy which it had issued on the life of one Tom Griffis Strong.

In the case of *Robbins* v. *New York Life Ins. Co.*, 18 Tenn. App. 70, an entirely different state of facts appears. The application plainly indicated that it was to be a part of the policy and the opinion of the court was plainly based upon this assumption. Indeed, were it otherwise it would certainly have been noted somewhere in the opinion.

The Court of Appeals, Sixth Circuit, cited in its opinion each of these cases, except possibly the *Little* case, which was merely repetitive.

We have been unable to find *a single case* cited by the petitioner which supports his contention that false representations made in an application for insurance, which by the terms of the contract of insurance, is no part of it, has ever been *even looked to* by an appellate court in Tennessee for the purpose of avoiding the policy or determining its validity, whether for fraud or otherwise. If able counsel for the petitioner had found such a case we believe it would have been cited and quoted by the petitioner.

The decision of the Court of Appeals in this case was in perfect accord with the applicable law, both federal and state, and was expressed, in its opinion, in language of unerring precision. The errors, inaccuracies and misstatements appear only in the petition for the writ of certiorari.

4.

The petition for the writ of certiorari presents a case without merit or public importance.

The petitioner issued to Ralph Harris a policy of public liability insurance which obligated it to pay the very

judgment sued upon in this action. It has breached its agreements as set forth in this contract. The only misrepresentation *claimed* to have been made by Ralph Harris was the one contained in the application wherein he said he had no physical defects. The application was no part of the policy and the representation made by Ralph Harris in it was not false or fraudulent. The petitioner had granted him some insurance for years and he had safely operated automobiles, tractors and other motor vehicles without accident until the accident here involved.

Upon the occurrence of the accident and the resultant injuries to his father, he willingly gave a complete statement to the investigator for the petitioner which was consistent with his subsequent testimony in the negligence action. He cooperated with the attorney who had been engaged by petitioner to defend the action by responding to every summons to come to the office of the attorney for conferences. He was present at the time of the trial. He executed an appeal bond incident to a review of the case in the State Court of Appeals. A final judgment was rendered against him and the matter was *res adjudicata* when the present action was instituted for recovery against the petitioner.

Upon the trial of this case in the United States District Court there was a manifest effort, upon the part of petitioner to re-try the negligence case, as the record herein plainly discloses. It apparently had its effect, for while respondent was engaged in litigating the real issues before the District Court, the petitioner was saturating the record with details of the accident in which respondent was injured. The result was that the record discloses circumstances and details, with respect to the accident, out of their real perspective. The evidence is without the proper balance as to the actual cause of the accident, and the re-

spondent was definitely prejudiced by it in the court below, as the lower court's findings of fact and conclusions of law verbally reveals. The Court of Appeals recognized that such evidence was wholly irrelevant. The issues in the negligence case were settled before this action was commenced.

The petitioner has, nevertheless, quoted an expression contained in the opinion, wherein the Court of Appeals made the passing observation, that "we would have had no doubt, had we been the triers of fact, in arriving at a judgment in favor of appellee." This remark of the Court was *pure dictum* but, unfortunately, it has, we believe, induced the petitioner (or has been one of the chief contributing causes), to present its petition for the writ of certiorari to this Court. In our effort *to confine our evidence to the real issues*, will the Court say that the respondent ought to be punished, or that the judgment of the Tennessee Courts should be, by indirection and a misuse of the processes of court, reversed and set aside? This Court does not have before it the record that was before the Circuit Court of Obion County, Tennessee, or the one which was before the Court of Appeals of Tennessee.

The respondent and his son, Ralph Harris, were seriously injured in the accident. In fact, it is claimed that the latter had a "spell" or two after the accident. He was injured about the head in the accident, but the weight of the evidence, as found by the Tennessee Courts, was that the accident was caused by his falling asleep at the wheel of his automobile.

There are scores of cases wherein the courts have been called upon to say whether there was a breach, upon the part of the insured, with respect to the cooperation clause of such policies. This Court has declined to review any

of them, according to our research. There are extensive annotations on the subject. 72 A. L. R. 1446; 98 A. L. R. 1465. We do feel that, under the Rules of this Court, we would be observing the admonitions with respect to brevity, by referring to the cases cited in them, and the many variant situations of fact which are illustrated in the decisions of the courts of the land.

The judgment rendered in the Circuit Court of Obion County, Tennessee, was just and the petitioner should be compelled to satisfy it to the extent of $10,000.00, with interest, as the Court of Appeals for the Sixth Circuit has adjudged.

The petition for the writ of certiorari should be DENIED.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *Petitioner,* vs. OMER M. HARRIS, *Respondent.*	No. 129.

CERTIFICATE OF SERVICE.

I, Charles W. Miles III, one of the attorneys of the Respondent herein, and member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of June, 1956, I served true copies of the above and foregoing Brief for Respondent in opposition on petitioner, by mailing on said date such true copies, respectively, in duly and properly addressed envelopes, by first class postage, prepaid, to Petitioner's attorneys, as follows:

To: William M. Hall, Esq.,
Columbian Mutual Tower,
Memphis 3, Tennessee.

To: Robert P. Adams, Esq.,
Trenton, Tennessee.

To: Sam C. Nailling, Esq.,
Union City, Tennessee.

To: Charles L. Neeley, Esq.,
Columbian Mutual Tower,
Memphis 3, Tennessee.

.....,

CHAS. W. MILES III,
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